IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,

v.

WANDA JUNE WEEKS, *Appellee.*

On Appeal from the United States District Court
for the Western District of Oklahoma

JURISDICTIONAL STATEMENT OF THE APPELLANT DELAWARE TRIBAL BUSINESS COMMITTEE, MEMBERS THEREOF, AND INTERVENOR DELAWARE TRIBE OF INDIANS

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TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES AND TREATIES INVOLVED	3
STATEMENT	4
Awards Not in Issue on This Appeal	5
The Proceedings in Issue	6
THE QUESTIONS ARE SUBSTANTIAL AND SHOULD BE DECIDED BY THIS COURT	8
CONCLUSION	17
APPENDIX	1a
Majority Opinion	1a
Dissenting Opinion	79a
Judgment	88a
Notice of Appeal	90a
25 U.S.C. §§ 1181-86 (1970)	92a
25 U.S.C. §§ 1291-97 (Supp. IV, 1974)	94a
Treaty of May 6, 1854	98a
Treaty of July 4, 1866	107a

TABLE OF AUTHORITIES

CASES:

Baker v. *Carr*, 369 U.S. 186 (1962) 10, 11
Cherokee Freedmen v. *United States*, 195 Ct.Cl. 39 (1971) 14
Cherokee Nation v. *Hitchcock*, 187 U.S. 294 (1902) 9

	Page
Dandridge v. *Williams*, 397 U.S. 471 (1970)	17
Delaware Tribe v. *United States*, 9 Ind.Cl.Comm. 346 (1961)	6
Delaware Tribe v. *United States*, 21 Ind.Cl.Comm. 344 (1969)	7
Jefferson v. *Hackney*, 406 U.S. 535 (1972)	2
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903)	9
McClean Trucking Co. v. *United States*, 321 U.S. 67 (1944)	17
Morton v. *Mancari*, 417 U.S. 535 (1974)	14
Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335 (1940)	12
Richardson v. *Belcher*, 404 U.S. 78 (1971)	2
Sac and Fox Indians of the Mississippi in Iowa v. *Sac and Fox Indians of the Mississippi in Oklahoma*, 220 U.S. 481 (1911)	8
Tigner v. *Texas*, 310 U.S. 141 (1940)	15
Turtle Mountain Band of Chippewa Indians v. *United States*, 490 F.2d 935 (Ct.Cl. 1974)	13
Weinberger v. *Salfi*, 422 U.S. 749 (1975)	16
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)	13

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES:

U.S. Const., art. II, § 2, cl. 2	9
Act fo April 24, 1904, ch. 1402, § 21, 33 Stat. 189	5
25 U.S.C. §§ 1181-86 (1970)	6
25 U.S.C. §§ 1291-97 (Supp. IV, 1974)	7
Treaty of May 6, 1854, 10 Stat. 1048	4, 8
Treaty of July 4, 1866, 14 Stat. 793	4, 5, 6, 8

MISCELLANEOUS:

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (U.N. Mex. ed. 1942)	14
1975 IND. CL. COMM. ANN. REP.	11

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JURISDICTIONAL STATEMENT

Appellants, Delaware Tribal Business Committee, Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine, and Y. A. Scott and the Delaware Tribe of Indians, Intervenor in No. Civ. 74-368-D, appeal from the judgment of a three-judge

United States District Court for the Western District of Oklahoma based upon the opinion of two judges, and contrary to a strong dissent, declaring unconstitutional Public Law 92-456, 86 Stat. 762, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), and enjoining the Secretary of Interior from distributing, under that statute, funds for the payment of Indian Claims Commission awards totaling $9.17 million plus interest rectifying a wrong to the Delaware tribe in 1855-56, to members of the Delaware Tribe and the Absentee Delaware Tribe of Western Oklahoma to the exclusion of persons whose Delaware ancestors "dissolved" their tribal relationships in 1866 and became solely citizens of the United States.

OPINION BELOW

The opinions in the District Court for the Western District of Oklahoma are not yet reported. The opinions and the judgment appear at App. 1a and 88a.

JURISDICTION

Suit was brought under 28 U.S.C. § 1331 and § 1362 and 5 U.S.C. § 701 *et seq.* to enjoin enforcement of two statutes by the Secretary of the Interior on grounds they are unconstitutional. A three-judge court was convened pursuant to 28 U.S.C. §§ 2282 and 2284 (1970). The District Court entered judgment on December 18, 1975. Appellants' notice of appeal was filed on January 16, 1976. (The Notice appears in the Appendix). The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U.S.C. §§ 1252 and 1253 (1970). The following decisions sustain the jurisdiction of this Court: *Richardson* v. *Belcher*, 404 U.S. 78, 80 (1971) (Section 1252); *Jefferson* v. *Hackney*, 406 U.S. 535, 539 (1972) (Section 1253).

QUESTIONS PRESENTED

1. Where a treaty between the United States and the Delaware Nation expressly provides for the distribution of all proceeds from the sale of tribal land to the tribal people and, where, by subsequent treaty, certain members of the tribe elected to expatriate themselves from the tribe and to renounce all rights to share in the tribal property, does the claim by descendants of those who elected to renounce their tribal rights that they are unlawfully excluded from participating in compensation awarded by the Indian Claims Commission for tribal lands sold under the earlier treaty present a justiciable controversy?

2. Did Congress act with patent arbitrariness and without rational justification in deciding that an Indian Claims Commission Award redressing breach by the United States of an 1854 Treaty should be distributed solely to those currently holding citizenship in the Delaware Nation, to the exclusion of those having Delaware ancestry but whose ancestors, by treaty with the United States in 1866, for valuable compensation, elected to "dissolve" their Delaware citizenship and become citizens solely of the United States and who thereafter never have been recognized as members of the Delaware Nation?

STATUTES AND TREATIES INVOLVED

U.S. Const. art. II, § 2, cl. 2; U.S. Const. amend V.

Treaty of Oct. 3, 1818, 7 Stat. 188; Treaty of Sept. 24, 1829, 7 Stat. 327; Treaty of May 6, 1854, 10 Stat. 1048; Treaty of July 4, 1866, 14 Stat. 793.

Act of June 22, 1874, ch. 389, 18 Stat. 146, 175; Act of July 1, 1902, ch. 1375, § 68, 32 Stat. 716, 726; Act of Apr.

21, 1904, ch. 1402, § 21, 33 Stat. 189, 222; 25 U.S.C. §§ 1181-86 (1970) and §§ 1291-97 (Supp. IV, 1974).

STATEMENT

The United States inexorably pushed the Delaware Tribe of Indians from the eastern seaboard to its final resting places in what is now Oklahoma; it extorted or made, and sometimes broke, treaties under which it took over Delaware lands.

A greatly abbreviated history, but one sufficient to show the importance of the issues here to the future relations and obligations of the United States to Indians, shows that the Delaware tribe was shunted first into Ohio and Indiana; in 1818 from there to Missouri; in 1829 from Missouri to a supposedly "permanent" home in Kansas. In 1854 the United States procured considerable of the tribe's Kansas land on a treaty promise to sell it at public sale, remit some of the proceeds "to the Delaware people" and hold the balance in trust, under investment "for the benefit of the Delaware people." Treaty of May 6, 1854, 10 Stat. 1048, App. 98a. (Violation of that duty to sell at public sale and invest is the foundation of the Indian Claims Commission Award of $9.17 million, plus interest, underlying this case, posing the question of who should share in the congressional appropriation for payment thereof).

In 1866, the United States moved the tribe from the balance of its Kansas land to the Indian Territory under a treaty, July 4, 1866, 14 Stat. 793, App. 107a, which provided, in substance, that those members not wishing to remove could "elect whether they will dissolve their relations with their tribe and become citizens of the United States." App. 109a. Those electing to dissolve their relations with the Delaware Tribe and become

citizens solely of the United States were entitled to and did receive title to the land previously allotted them, their just proportion of the value of the tribal trust then held by the United States, and their proportion of the proceeds of land sold under the 1866 Treaty.[1] Nevertheless descendants of such ethnic but "dissolved" Delawares, known herein as the "Kansas Delawares" class, claim to share in the distribution here, and the failure of Congress to include them with Delawares who maintained their tribal citizenship through the "Delaware Indian Tribe" or the "Absentee Delaware Tribe" has been held "irrational" and unconstitutional by the majority of the three-judge District Court.

The Kansas Delaware class number approximately 700 persons, App. 3a-4a, n.3, and the membership of the Delaware Tribe and the Absentee Delaware Tribe is estimated at 7700 and 1800 respectively.

AWARDS NOT IN ISSUE ON THIS APPEAL

Early in this century, under a special jurisdictional act, the Delaware Nation filed suit which, *inter alia,* sought compensation for the "outlet lands" ceded under the 1854 treaty. This was settled by a congressional appropriation in 1904 of $150,000 for the "Delaware Tribe of Indians residing in the Cherokee Nation." Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222; *see* App. 13a-14a n.15. Distribution of this fund required that a per capita tribal payroll be drawn by the Department of the Interior. A number of Kansas Delawares or their

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[1] The 21 adult Delawares who expatriated themselves were amply able to make an intelligent choice. Article 9 of the treaty, App. 113a-14a, required them to appear before a federal judge and prove their intelligence and prudence and that they had supported themselves and their families for at least five years.

descendants applied for inclusion on it. Such applications were rejected on ground that the applicants, or their ancestors, had dissolved all tribal relations and rights to tribal property by renouncement of Delaware citizenship under the 1866 treaty. App. 113a-14a.

In 1951, two members of the Absentee Delaware Tribe filed suit in the Indian Claims Commission (Docket No. 337), claiming additional compensation for the lands ceded in Indiana and Ohio under the 1818 treaty. App. 12a. The Commission granted judgment for $1.63 million "on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." 9 Ind. Cl. Comm. 346 (1961), App. 12a. The suit had been filed on behalf of *all* descendants. In 1968, Congress passed a judgment distribution act for Docket 337, 25 U.S.C. §§ 1181-86 (1970), App. 92a, providing that persons were eligible to participate if their name or that of a lineal ancestor appeared on the 1906 per capita payroll, the 1940 constructed base census roll of the Absentee Delaware Tribe (or was eligible to be on such roll), or was able to show lineal descent from a member of the Delaware Nation as constituted in 1818. App. 92a. Distribution under that statute has not been completed, principally because of conflicting and spurious claims by would-be distributees and administrative appeals. App. 32a, 83a.

THE PROCEEDINGS IN ISSUE

In 1950 and 1951, the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Indians filed claims with the Indians Claims Commission, Docket Nos. 72 and 298, based on breach of the 1854 treaty. App. 15a-16a. The United States conceded the violation and the Commission awarded a judgment

totaling $9.17 million as of August 31, 1969 to "the plaintiffs." 21 Ind. Cl. Comm. 344 (1969), App. 15a-16a. It is distribution of an appropriated fund pursuant to a distribution statute for discharge of that obligation, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), enacted October 3, 1972, that has been enjoined. (The statute appears at App. 94a.) The statute provides for payment only to those born on or prior to its date and whose name, or the name of a lineal ancestor, appears on the Delaware roll of 1906 or the constructed base census roll of the Absentee Delaware Tribe (or those who were eligible to be on such roll), 25 U.S.C. § 1291 (Supp. IV, 1974), App. 95a. This excludes, *inter alia,* descendants of those who left the tribe under the 1866 treaty—the Kansas so-called Delawares.

Plaintiff Weeks brought suit on behalf of the Kansas Delaware class seeking declaratory and injunctive relief against distribution pursuant to both the 1968 and the 1972 statutes. She asserted they violated the fifth amendment to the Constitution. She complained of the inclusion of the "Cherokee Delaware" class in both the 1968 and 1972 distribution statutes and the exclusion of the "Kansas Delaware" class from the latter. Plaintiffs Frazier and Rattler filed a similar suit and the cases were consolidated. App. 4a.

The three-judge court entered a preliminary injunction enjoining distribution of the funds appropriated to pay the judgments. App. 4a. The majority of the court ultimately held, one judge dissenting vigorously, that the exclusion of the Kansas Delawares in the 1972 statute, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), constituted an "irrational" classification and permanently enjoined the Secretary of the Interior from distrib-

uting under that statute. App. 63a-64a. The court unanimously rejected plaintiffs' claims that the Cherokee and Absentee Delaware classes should not participate in either distribution. App. 64a.

THE QUESTIONS ARE SUBSTANTIAL AND SHOULD BE DECIDED BY THIS COURT

This case is novel and should be considered fully by this Court because, as the dissenting judge, who held the matter was nonjusticiable, stresses, one cannot find "a single case in which an Act of Congress relating to the affairs of Indians has been stricken down as being unconstitutional and void as the majority does herein." App. 80a. The dissent further held that if the matter was justiciable, the distribution only to tribal Delawares was "abundantly rational" and was supported by legal precedent. App. 82a.

The 1854 Treaty obligated the United States to pay or hold in trust the proceeds from the sale of Delaware tribal land to, or for the benefit of, "the Delaware people" on the basis of their membership in the tribe, not on the basis of their racial identity. As Justice Holmes said, "the government did not deal with individuals, but with tribes." *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma,* 220 U.S. 481, 484 (1911). The Delaware tribe is a continuing quasi-sovereign entity. But, under the expatriation option provided in the 1866 Treaty, plaintiffs' ancestors elected to "dissolve" all political, social, and legal ties with the tribe and to become citizens of the United States alone.

The terms of these treaties are clear. The courts cannot properly conclude, as the majority below did, that Congress must now award further compensation

for the sale of tribal land to non-Delawares on the basis of racial lineage alone, for to do so revises the treaty commitments of the United States to the Delaware tribe. Under our Constitution, treaty revision is not a power committed to the Judiciary. U.S. Const., art. II, § 2, cl. 2. Once the majority conceded "that the plaintiffs here [expatriate Kansas Delawares] have no property or vested rights in the award," App. 62a, it made it clear that the plaintiffs' ancestors had no vested rights in the 1854 property for which compensation was promised only to "the Delaware people"—not to legal strangers to the Delaware people. It is clear that the majority rewrites the 1854 Treaty on behalf of strangers to the tribe.

Never before has a court attempted to interfere with the judgment of Congress as to distribution of a damage award for improper handling of tribal lands or funds. This Court has ruled consistently that since the congressional power to administer tribal property is "political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 308 (1902). The courts have presumed that Congress has "exercised its best judgment," but that in any event, because it possesses "full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of [particular] legislation." *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 568 (1903). If the legislation occasions injury "relief must be sought by an appeal to [Congress] for redress, and not the courts." *Id.*

Here, however, the majority below inquired in the greatest detail into the motives which prompted Con-

gress to order distribution of an Indian Claims Commission Award, 10 percent to the tribal organizations and 90 percent on a per capita basis to tribal members to the exclusion of descendants of expatriated Indians who had renounced their political and property tribal relationship. The majority concluded that Congress did not dig deeply enough and seemingly failed to discover that there were persons of Delaware blood whose ancestors were tribal members in 1856-1857, the time of the wrong, but who, in 1866, renounced their tribal citizenship and became citizens solely of the United States. The majority believes that if Congress had considered the existence of the descendants of that group of expatriates it probably would have included them in the per capita distribution because the wrong occurred prior to the time the ancestors deserted the tribe; "equity" would have required it to do so, says the majority. Because "equity" was not done, says the majority, the distribution statute, which Congress knew excluded numerous, if not these particular people of Delaware blood, is unconstitutional.

Note that the majority did not delve into the congressional hearings for aid in construing the statute, for it is clear and needs no construction. It dug into the hearings to show what "motivated" Congress to do what it did—to determine why it adopted the policy it did.

It is one thing for the courts to intervene when states take no action on a political problem, or, as it is put in *Baker* v. *Carr,* 369 U.S. 186, 226 (1962), where state action reflects "*no* policy, but simply arbitrary and capricious action." It is quite another when Congress has acted, has expressed the policy of distribution only to, or for the benefit of, tribal members, knowing full well

that it was excluding expatriate Delawares, to say that the courts may strike the enactment down and, in practical effect, order the inclusion of the plaintiff class in any future distribution statute.

What the majority has done is to carry the power of judicial intervention far beyond *Baker* v. *Carr,* 369 U.S. 186 (1962), and, we suggest, is to stretch the fifth amendment beyond the breaking point.

The issue is of recurrent importance because many cases are before the Indian Claims Commission and the Court of Claims for ancient wrongs done Indian nations, in some of which it seems likely corrective awards will be made.[2] Congress eventually will have to decide, as it did here, what persons or tribes, and in what proportions, should benefit therefrom.

Is there a constitutional requirement that these benefits go to all lineal descendants of members of the tribe as of the date of the wrong even if their ancestors subsequently renounced Indian citizenship and became so non-Indian that Indians lost sight of the descendants? Or can Congress, as here, direct distribution partially to the tribe with the balance only to those who, at the time of the award, 115 years after the wrong, are tribal citizens?

The phenomenon of renouncement of tribal citizenship is not peculiar to the Delawares.

And certainly there is no *per se* inequity or unfairness in restricting the benefits of an award for an injury to communal tribal property to those who will

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[2] As of June 30, 1975, 175 distinct Indian claims were pending before either the Commission or the Court of Claims. 1975 Ind. Cl. Comm. Ann. Rep. App. 4.

benefit from it as Indians and members of the tribe to the exclusion of descendants of Indians who long ago renounced Indian citizenship and whose descendants became lost in the general citizenry.

The majority opinion, if permitted to stand by a summary affirmance, would greatly change Indian law. The majority reasons that if Congress was unaware of the existence of the descendants of the particular group of expatriates that brought suit, their exclusion was an arbitrary or "irrational" classification. Passing the *non sequitur,* it is to be observed that the majority bases its incursion into the legislative field and its suave disavowal of "any disrespect for a political decision by a coordinate branch" upon the following insupportable premise:

> "There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function. Instead these recent enactments deal with equitable distribution following a judicial award, and proper classifications for the distribution." App. 25a.

This Court has recognized that the Indian problem "is essentially a sociological problem, not a legal one." *Northwestern Bands of Shoshone Indians* v. *United States,* 324 U.S. 335, 355 (1940) (Jackson, J., concurring). A distribution statute, including or excluding persons of Indian blood from a monetary distribution and determining what proportion, if any, of the distribution is to go to the tribe is most assuredly a policy determination of a sociological nature, the majority opinion to the contrary notwithstanding. For example, Congress might have ruled that 50 percent or 90 percent of the award be distributed to the tribes and only the balance go out per capita. And there is no consti-

tutional requirement that congressional distribution conform to a particular court's sense of equity.

A second important step in the majority's doctrine is:

> "We do not find any authority *unmistakably* sustaining congressional authority to exclude one group of Indian descendants from benefits conferred broadly on others who apparently stand on equal footing." App. 20a (emphasis supplied).

There are two aspects of that which merit this Court's full consideration:

First, in a field in which Congress admittedly has unusually wide plenary power, must there be "unmistakable" proof of authority?

Second, except for possible blood lines,[3] the Kansas Delaware descendants do not, either "apparently" or actually, stand on equal footing with the tribal members. Those descendants are not a people "distinct" from others. *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832). As the dissent forcefully points out, it is only by ignoring 110 years of history and the fact that their ancestors (adults and minors) severed all tribal affiliation in 1866 that a claim of parity on the part of plaintiffs can even be started.

Perhaps Congress, in 1972, could have decided to have the distribution relate back to 1856-57 so that modern non-Delawares could share, but that was not necessary. Felix Cohen has written that "in dealing with

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[3] It may be noted that the Court of Claims has said that "the biological standard" is probably the least helpful in determining Indian title. *Turtle Mountain Band of Chippewa Indians* v. *United States,* 490 F.2d 935, 942 (Ct.Cl. 1974).

Indians the Federal Government is dealing primarily not with a particular race as such but with members of certain social-political groups towards which the Federal Government has assumed special responsibilities." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 5 (U.N.Mex. ed. 1942). To hold, as the majority below did, that it was "irrational" for Congress to distribute this judgment fund on the basis of membership in Delaware social-political groups rather than to all of Delaware descent, calls for a fundamental change in Indian law and congressional Indian policy. *See Morton* v. *Mancari*, 417 U.S. 535, 541-42, 551-55 (1974). The fifth amendment of the Constitution certainly does not require such a change, and it is inappropriate for the Judiciary to mandate this revision.

The difference between the tribal Delawares and the Kansas Delawares who have done nothing for the tribe appears on the face of this record. The Kansas Delawares could have intervened in the Claims Commission proceedings here, *cf. Cherokee Freedmen* v. *United States*, 195 Ct. Cl. 39, 51 (1971); certainly they could have petitioned Congress when it was considering how distribution should be made. They did not; the tribal members did. The plaintiff group did not surface in these proceedings until after the Indian Claims Commission had acted (after protracted hearings), Congress had acted (after hearings), and chance of obtaining a cash windfall had appeared.

The fact on which the majority hinges its decision *i.e.*, that the Kansas Delawares supposedly were "overlooked," is telling proof of a readily apparent and "abundantly" rational distinction between them and the tribal members who Congress said should receive per capita distribution. "The Constitution does not require things which are different in fact or opinion

to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940).

The majority expressly held that the plaintiffs and their ancestors had no vested property right in the Indian Claims Commission award. App. 61a-62a. Yet by treating the Kansas so-called Delawares as equally entitled to share in what is clearly tribal property (because of its origin as compensation for wrongs done to the tribal-entity), the majority by unspoken analogy to common law property rules and rules of descent, treats the 1854 and 1866 treaties as creating individual, indefeasible rights in what was at the time a mere potential chose in action. It admits (App. 61a-62a) that it cannot reach its result by "property or vested rights" theories, but it gets there just the same by taking an unwarranted constitutional detour. The inconsistency of the majority's reasoning is patent; its arbitrary rejection of basic principles governing the tribal nature of Indian property should not be permitted to stand.

What is the end result of the majority's legal theorizing?

It leaves the penalty on the United States the same—$9.17 million, plus interest.

But it diminishes the benefits to recognized Indians by giving a windfall to individuals with no Indian citizenship.

When the cured status becomes worse than the allegedly diseased one, there plainly is something wrong with the prescribed remedy. The incongruous result which the majority arrived at by mistaken notions of "equal" treatment is certainly not sound Indian policy

because the objective of the Indian Claims Act is to redress Indians for wrongs done their tribes.

The decision to distribute only to Delaware nationals, claimed by the majority to have no rational basis, did not come about through inadvertance. It was made because attempted distribution of the earlier $1.63 million award to all Delaware lineal descendants, regardless of lack of Delaware citizenship, had proved to be unworkable and fraud-provoking. App. 31a-33a, 83a.

After hearings exposed the inappropriateness of unlimited lineal distribution, Congress decided that the distribution of 90 percent of the $9.17 million fund to tribal citizens, with 10 percent reserved for the tribe, was the proper way for the United States to honor its 1854 treaty obligations "to the Delaware people." Congress well could conclude "that the expense and other difficulties of individual determinations" of ancient Delaware lineage justified the decision it made. *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975).

Congress, the Bureau of Indian Affairs, and Indian Tribal Governments, all interested in and charged with protecting the welfare of Indians, are, we submit, entitled to a full hearing and ultimate decision by this Court as to whether federal judges may ignore the expertise of the Bureau and invade the policy-making functions of the Executive and Legislative branches of the Government under the guise of alleged constitutional imperatives which prove to be no more than the particular judges' notion of how a delicate matter should be handled "equitably." Courts are not at liberty to strike down or expand legislation because they regard the law's classifications as imperfect, unwise, or insufficiently comprehensive or because the court believes a better system could be devised. *Dandridge* v. *Williams*, 397 U.S. 471, 485, 487 (1970); *McClean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944).

Since awards for wrongs to Indian tribes stem from the power of the Executive and Legislative branches to make treaties, rectify breaches of them, and exercise supervision over Indians it is appropriate that the Judiciary continue not to interfere. We respectfully suggest that the Judiciary is neither authorized nor equipped to dictate how the remedy for wrongs to Indian tribes shall be fashioned.

CONCLUSION

We respectfully suggest that the order below could well be reversed without further briefing or argument on the strength of the dissenting opinion and the observations made in this Statement. The majority premise that descendants of expatriate Delawares stand on the same footing as tribal Delawares is without foundation. The finding of the dissenting opinion that "the record [contains] an abundance of rationality to support the distribution of funds made by Congress" cannot be denied successfully. And if that is true it is the end of the case.

If, however, the Court wishes further to test the matter and determine whether the Courts can, or should, question the wisdom of congressional decisions as to how funds for Indians should be distributed, then, we suggest, full briefing and argument should be ordered, for, if the majority opinion ultimately was upheld, United States courts would be plunged deeply into the legislative field in Indian affairs. This Court for more than a hundred years has declined to enter that field.

We, therefore, pray that this Court reverse the decision of the majority below and remand this matter to the District Court with orders to vacate its judgment and lift its injunction against the Secretary of the Interior.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-73-586-E

(CONSOLIDATED)

No. CIV-74-368-D

WANDA JUNE WEEKS, *Plaintiff*,

v.

United States of America; STANLEY K. HATHAWAY, Secretary of the Interior of the United States of America and Trustee for the Delaware Indian People; The Delaware Tribal Business Committee; The Absentee Delaware Tribe of Oklahoma Business Committee; Bruce Miller Townsend; Nathan H. Young; Mary Townsend Crow; Henry A. Secondine; Y. A. Scott; Arthur L. Thomas; Alene Martinez; Myrtle Holder; Tommy Holder; Lawrence Snake; Charles Taylor; Clio Church; Mabel Murray, and Grace Spooner,
Defendants,

and

DOROTHY FRAZIER and RUTH RATTLER, on their own behalf and on behalf of all those similarly situated,
Plaintiffs,

v.

STANLEY K. HATHAWAY, Individually and in his capacity as Secretary of the Interior of the United States of America,
Defendant,

THE DELAWARE TRIBE OF INDIANS,

and

The Absentee Delaware Tribe of Western Oklahoma Business Committee, and the named members of said Tribe,

on behalf of the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delaware Class).

Intervenors.

(FILED DECEMBER 18, 1975)

* * *

Before HOLLOWAY, Circuit Judge; DAUGHERTY, Chief Judge, Western District of Oklahoma, and EUBANKS, District, Judge, Western District of Oklahoma

Memorandum Opinion by Holloway, Circuit Judge, in which Eubanks, District Judge, Western District of Oklahoma, joins; Daugherty, Chief Judge, Western District of Oklahoma, concurs in part and dissents in part

Memorandum Opinion

These suits challenge the constitutionality of two federal statutes. The first, Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, determines the Indian descendants who may participate in the distribution of an Indian Claims Commission award redressing a wrong by the United States under an 1818 treaty with the Delaware Tribe. 7 Stat. 188.[1] The second statute, Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, performs the same function for a separate Indians Claims Commission award redressing a breach by the United States of an 1854 treaty with the Delawares. 10 Stat. 1048.[2]

Three classes of Delaware Indian descendants are represented by the parties in these cases. The plaintiffs represent a group known as the Kansas Delawares. The de-

[1] The Indian Claims Commission findings and conclusions in Docket No. 337 concerning the wrong under this 1818 Treaty are reported at 9 Ind. Cl. Comm. 346.

[2] The Indian Claims Commission findings and conclusions in Dockets Nos. 72 and 298 concerning the wrong under this 1854 Treaty are reported at 21 Ind. Cl. Comm. 344.

fendants represent two groups of descendants known as the Cherokee Delawares and the Absentee Delawares.

In 25 USCA §§ 1181-86, relating to the 1818 wrong, Congress devised distributive classifications that permitted descendants in all three classes to share in the award. Invoking the Fifth Amendment Due Process Clause and equal protection principles incorporated by it, and the Just Compensation Clause, the Kansas Delawares challenge the constitutionality of the statute's inclusion of the Cherokee Delawares in these distribution provisions.

In 25 USCA §§ 1291-97, relating to the 1854 wrong, Congress provided distributive classifications that permitted only the Cherokee Delawares and the Absentee Delawares to share in the award. With respect to this statute, the Kansas Delawares challenge the constitutionality of (1) their exclusion from the distributive provisions, specifically under the Due Process Clause and equal protection principles incorporated by it, and under the Just Compensation Clause, and (2) the inclusion of the Cherokee Delawares and Absentee Delawares, invoking the same Fifth Amendment principles.

Plaintiffs seek declaratory, injunctive and mandamus relief against distributions under both statutes.

We find merit in plaintiffs' challenge to 25 USCA §§ 1291-97 as an irrational classification, insofar as the statute excludes the plaintiff class of Kansas Delawares[3]

[3] The Kansas Delaware class is reported to be composed of over 600 members (plaintiff Weeks' report on membership filed February 4, 1975). As of February, 1975, it was reported that notification by mail of 496 Kansas Delawares had been achieved (plaintiff Weeks' affidavit of service of notice of class action filed February 26, 1975).

The report to the court on membership of the Kansas Delaware class filed February 4, 1975, states that presently ascertained members whose identities are known total 636. In addition, the February 26, 1975, affidavit of plaintiff Weeks states that, upon

from participating in the distribution of the award in Indian Claims Commission Dockets Nos. 72 and 298, relating to the 1854 wrong, and enjoin the defendant Secretary of Interior from making distribution of funds thereunder. We reject all other contentions of the Kansas Delawares concerning the validity of that statute.

We do not sustain the plaintiff Kansas Delawares' challenge to 25 USCA §§ 1181-86, relating to the 1818 wrong, and vacate the preliminary injunction restraining distribution of the remaining funds of the award in Indian Claims Commission Docket No. 337 redressing that wrong.

The plaintiff Weeks in No. Civ. 73-586-E filed her complaint alleging that this court has jurisdiction of this action "under Article III, Section 2 of the Constitution of the United States, under 28 U.S.C. § 1331 and § 1362, and 5 U.S.C. § 701 et seq." (Complaint para. 14). This three-judge court was convened to hear the case. After an evidentiary hearing we entered a preliminary injunction enjoining the defendant Secretary from distributing any of the funds held by him that were appropriated by Congress to satisfy the judgments in Indian Claims Commission Docket No. 337, dealing with the 1818 wrong, and Dockets Nos. 72 and 298, dealing with the 1854 wrong (with specified limited exceptions agreed to by all parties), pending the final determination of this action.

Plaintiffs Frazier and Rattler in No. Civ. 74-368-D filed their complaint in the Northern District of Oklahoma. Because this case involves substantially the same parties and subject matter, it was transferred to this district and consolidated with No. Civ. 73-586-E pursuant to Rule 42(a) F.R.Civ.P. The same panel was constituted to hear it.

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receiving additional information from the Secretary as to identities and addresses of additional Kansas Delawares, approximately 42 additional persons were mailed notice, making a total of 678 Kansas Delawares who have been identified.

This court sustained a motion to dismiss of the United States on the ground that the action as against the Government was an unconsented suit. Other motions to dismiss and for summary judgment were denied and we certified the action as against the remaining defendants to proceed as a class action by plaintiff class, the Kansas Delawares, against, *inter alia*, defendant classes, the Delaware Tribe of Indians (the Cherokee Delawares) and the Absentee Delaware Tribe of Western Oklahoma (the Absentee Delawares).[4] No question is raised as to the propriety of the class action procedure.

We will discuss the issues under the following propositions: (1) the historical background; (2) jurisdiction and justiciability; (3) validity of the statutory exclusion of the Kansas Delawares from distribution of the award redressing the 1854 wrong; (4) validity of inclusions of the Cherokee Delawares in distribution redressing both the 1818 and 1854 wrongs, and of the inclusion of the Absentee Delawares in distribution redressing the 1854 wrong;[5] and (5) equitable jurisdiction and remedies. This opinion will constitute our findings and conclusions pursuant to Rule 52, F.R.Civ.P.[6]

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[4] Class action representation in this suit is proper under Rule 23(b)(1)(B) and Rule 23(b)(2), F.R.Civ.P., since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, and since the defendant Secretary and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

[5] As noted, the plaintiff Kansas Delawares do not challenge the inclusion of the Absentee Delawares in distribution of the award redressing the 1818 wrong.

[6] There were numerous objections to the many exhibits offered in evidence at trial. We are citing those exhibits relied on in reach-

I

The Historical Background

The Delaware Indians were originally on the eastern seaboard, but by the second decade of the 19th century they were geographically scattered. One group of Indians of Delaware ancestry, the Munsee Indians, had become associated with the Moravian Indians, later known as the Christian Indians, or Christian Munsees, and had settled in Canada. Other Munsees were living with the Stockbridge in New York. This group became known as the Stockbridge Munsee. By 1818, the nucleus of the Delaware Nation was residing principally in Indiana and Ohio. See Senate report accompanying H.R. 16402, S. Rep. No. 1518, 90th Cong., 2d Sess. 8, which contains an historical outline of the Delaware Tribe and the various groups involved here (Defendants Secretary and Cherokee Delawares' Ex. 4, hereinafter cited as Senate Report).

Several years earlier, in 1793, the Spanish Government had granted a tract of land in Missouri to certain bands of the Delawares in Indiana and Ohio who wished to move beyond the Mississippi. A number of the Delawares moved to this grant, and later, on to Arkansas, Oklahoma and Texas, but the main body of the Tribe remained behind until the Treaty of St. Mary's was made in 1818, 7 Stat. 188 (Findings of fact No. 4 and 47, Ind. Cl. Comm. Docket No. 337, *supra* n. 1, Pl. Ex. 10, Tabs A and P).

Under this 1818 treaty, the Delawares ceded to the United States all their lands in Indiana,[7] and in return the United States agreed to give them land west of the Mississippi (Art. 1, 2). It appears that no Christian Munsees and

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ing our findings and conclusions and deny objections to the cited proof. Otherwise it is unnecessary to express evidentiary rulings.

[7] The remaining Delaware lands in Ohio were ceded to the United States by separate treaties. No claim concerning those lands is involved here.

only some of the Stockbridge Munsees were in residence with the main body of the Delaware Tribe at the time the Indiana lands were ceded by the 1818 Treaty (Senate Report, *supra,* at 8-9).

The Delawares moved to the Missouri tract where they remained until 1829. In September of that year, the Delawares entered into another treaty with the United States, which was designated as a "supplemental article" to the 1818 Treaty. 7 Stat. 327. Under the terms of this supplemental treaty the Delawares gave up their temporary residence in Missouri and accepted in lieu thereof, as their permanent residence, a reservation in Kansas. This reserve was part payment for the Delaware cession of the Indiana lands, and purported to satisfy the obligation of the United States under the 1818 Treaty to provide the Delaware Nation a permanent home west of the Mississippi (Findings of fact 5 and 6, Docket No. 337). But the trade was grossly unequal. The disparity in value between the Indiana lands ceded by the 1818 Treaty and the Kansas lands received under the 1829 Treaty later became the basis for the judgment rendered by the Indian Claims Commission in Docket No. 337. The statute distributing this award, 25 USCA §§ 1181-86, is one of the two distribution statutes being challenged in this suit.

After the Treaty of 1829 many of the Delawares that had preceded the Tribe into Missouri, and then into Arkansas, Oklahoma and Texas, moved on to the land assigned to them in Kansas. A portion of the members of the Delaware Tribe, however, remained in sections of Oklahoma and Texas. One group of Delawares, on its way from Texas to Kansas in 1853, obtained permission from the Choctaw Nation in the Anadarko area of Oklahoma to stay on its land as tenants at will (Finding of fact No. 48, Docket No. 337). Some of this group subsequently moved to the Kansas Reservation, but the majority remained behind in Oklahoma. These Delawares, together with others from Kansas

and elsewhere that later joined them, maintained group identity, having chiefs and a tribal council up to the present time. The descendants of this group, who are now residing among the Wichita and Caddo Indians at Anadarko, Oklahoma, comprise the defendant class, the Absentee Delaware Tribe of Western Oklahoma, or Absentee Delawares (Finding of fact No. 51, Docket No. 337).

On May 6, 1854, the main body of the Delaware Tribe residing on the Kansas lands entered into a treaty with the United States, 10 Stat. 1048. Under this treaty, which was not signed by any representatives of the Absentee Tribe (Defendants' Adm. No. 37, Pl. Ex. 154), the Delawares ceded their lands in Kansas, with certain exceptions, to the United States. These lands comprised the so-called hunting "outlet," extending westward into mid-Kansas, and the "residence lands" (Finding of fact No. 2, Ind. Cl. Comm. Dockets Nos. 72 and 298, *supra* n. 2, Pl. Ex. 10, Tab Q). Of the residence lands, part was reserved to the tribe as a permanent home (Art. 1), and four sections were to be conveyed to the Christian Indians who had since migrated to Kansas and were living with the Delawares in 1854 (Art. 13; Senate Report, *supra*, at 10). The remaining portion of the residence lands, the Delaware "trust lands", was ceded to the United States to be sold at public auction, with the proceeds going to the Delaware general tribal fund (Art. 2, 7; Finding of fact No. 2, Dockets Nos. 72 and 298).

However, in 1856 and 1857 the Government improperly sold the Delaware trust lands. It did not sell the lands at public auction as required by Article 2 of the 1854 Treaty, and as a result the Delawares received far less than they should have realized from the sale of their lands. (Findings of fact No. 4 and 8, Dockets Nos. 72 and 298). At this time ancestors of the plaintiff Kansas Delawares and of the defendant Cherokee Delawares were residing on Delaware lands in Kansas. The wrongful disposition of the Delaware trust lands in Kansas became the basis for the judgment rendered by the Indian Claims Commission in Dockets

Nos. 72 and 298, and underlies the other distribution statute challenged herein, 25 USCA §§ 1291-97.

Pursuant to the Treaty of 1854, the Delawares removed to that portion of the residence lands which the treaty had reserved for them as a permanent home (the "diminished reserve"). Then, by a treaty in 1860, 12 Stat. 1129, the United States agreed to survey the diminished reserve and to allot to each Delaware Indian an 80-acre tract in that reserve (Art. I). In addition, the treaty provided that 80-acre tracts were to be set aside for each of certain Absentee Delawares, approximated to be 200 in number, who were expected to move to Kansas and reassemble with the main body of the tribe in the near future (Art. IV).

In 1866 the Delawares entered into another treaty with the United States, 14 Stat. 793, the purpose of which was to provide for their removal to Indian Country in Oklahoma. The diminished reserve was to be sold by the United States, with the proceeds to be used for the purchase of 160 acres of land in the Indian Country for each Delaware man, woman and child who should remove thereto (Art. IV). However, all adult Delawares were to be given the opportunity under the treaty to elect whether to remove or, instead, to dissolve their relations with the Delaware Tribe and become citizens of the United States (Art. III). Each adult Delaware who thus elected to become a United States citizen was to receive fee simple title to the 80-acre tract allotted him under the 1860 Treaty, his just proportion of the Tribe's credits then held in trust (which included the proceeds of the sale of the trust lands), and also his proportion of the proceeds of the sale of the diminished reserve. Thereafter these persons were to share no further in Delaware property or annuities (Art. IX).[8]

The 1866 Treaty also provided that a registry would be made of the names of all the Delawares who thus elected

[8] Article IX of the 1866 Treaty is reproduced in Part C of the Appendix to this opinion.

to dissolve their tribal relations and remain in Kansas (Art. IX). The names of 21 adults and 49 minors appear on such registry (Pl. Ex. 44). They are the ancestors of the plaintiff class Kansas Delawares.[9]

In July, 1866, the United States and the Cherokee Nation made a treaty which provided for the relocation of civilized Indians on unoccupied Cherokee lands in the Indian country in Oklahoma. Art. XV, 14 Stat. 799. By an agreement in 1867 between the Delawares and the Cherokees (Pl. Ex. 10, Tab I), each individual of the Delaware Tribe who enrolled upon a certain register [10] acquired a life estate of 160 acres of land from the Cherokees (see Delaware Indians v. Cherokee Nation, 193 U.S. 127, 143), paid for by tribal funds,[11] and the right to become members of the

[9] Wanda June Weeks, the plaintiff in No. Civ. 73-586-E and representative of the plaintiff class in this consolidated action, established that she is a lineal descendant of one of the original Kansas Delaware Indians. One of the names appearing on the "Article IX Register" is Annie Grinter (Pl. Ex. 44). Annie Grinter was the great-grandmother of Wanda June Weeks (Transcript of Preliminary Injunction Hearing, 20, Pl. Ex. 15; Pl. Ex. 136a). Dorothy Frazier and Ruth Rattler, the plaintiffs in No. Civ. 74-368-D, alleged lineal descendancy through a Kansas Delaware named Lewis Ketchum (Plaintiffs Frazier and Rattler's Complaint, para. 5; Pl. Ex. 44), and established that they shared in the partial distribution of the award in Docket No. 337 (Pl. Ex. 136c and d).

[10] The names of 985 Delawares appear on this register (Defendants Secretary and Cherokee Delawares' Ex. 23, p. 73, 241. They are often referred to as "registered Delawares." The register is referred to as the "1867 Register."

[11] As noted, the 1866 Treaty, 14 Stat. 793, provided that the United States would use the proceeds from the sale of the diminished reserve to purchase the Cherokee lands (Art. IV). Actually, only the lands not allotted to the Kansas Delawares were to be sold.

The diminished reserve consisted of land which was held in severalty in 80-acre allotments and land held in common by the tribe. The 1866 Treaty provided that each Delaware removing to the Indian country would receive (in addition to the life estate in 160 acres of Cherokee land) the "value" of his 80-acre allotment

Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation. The Delaware Indians who removed to the Cherokee territory became members and citizens of the Cherokee Nation, but they and their descendants maintained group identity (Findings of fact No. 49 and 50, Docket No. 337).[12] The descendants of this group, who today reside in northeastern Oklahoma, comprise the defendant class Delaware Tribe of Indians, or the Cherokee Delawares.

The minor children of the adult Kansas Delawares did not immediately become United States citizens at the time of their parents' election under the 1866 Treaty. Rather, Article IX of the 1866 Treaty provided that they were to be considered temporarily severed from the tribe until they attained the age of twenty-one, at which time they too could make an election either to become citizens of the United States or remove to the Cherokee Delawares in Oklahoma. Until that time their just proportion of the Delaware tribal

in the diminished reserve, plus the "value" of any improvements he had made thereon (Art. III and VI). Apparently the purchase of the Cherokee lands was to be made from the proceeds of the sale of the lands held in common (Art. IV and VI). The residue of the proceeds of the sale of the diminished reserve was to be added to the general Delaware tribal fund (Art. VI), which already contained the proceeds of the sale of the trust lands. And, as previously discussed, each Kansas Delaware was to receive his proportionate share of this fund (Art. IX).

Docket Nos. 72 and 298 concerned only the improper disposition of the trust lands under the 1854 Treaty, and did not concern this sale of the diminished reserve provided for by the 1866 Treaty. See Findings of the fact No. 2 and 4.

[12] The Kansas Delawares deny that such tribal identity has been maintained by the Cherokee Delawares and claim instead that the identity of the Cherokee Delawares was lost as a group when they became absorbed into the Cherokee Nation. We are unable to agree, and find that the Cherokee Delawares have maintained group identity, having tribal chiefs and business committees continuously until the present time.

annuities was to be paid to their parents for the children's support and education. If thus admitted to citizenship upon reaching majority, such minors were to be entitled to "all the privileges and interests herein provided for the head of the family." Art. IX, 14 Stat. at 796.

By an Act approved June 22, 1874, ch. 389, 18 Stat. 146, 175 Congress appropriated funds to pay all the minor children of the adult Kansas Delawares their proportionate share of the money and stocks held in trust by the United States for the Delaware Tribe, and directed the Secretary of the Interior to issue a fee-simple title to the lands allotted them under the 1866 Treaty. By this same Act Congress also declared all such minors to be citizens of the United States, thus eliminating the requirement of an election.[13]

Docket No. 337 - 25 USCA §§ 1181-86

In 1951 a suit was filed in the Indian Claims Commission by two members of the Absentee Delaware Tribe of Oklahoma on behalf of all the descendants of the Delaware Nation as constituted in 1818 to redress the wrong committed by the United States under the 1818 Treaty. The Commission found that the value of the lands in the Kansas reservation given by the United States in the 1829 supplemental treaty, together with other cash payments and gratuitous expenditures determined to be proper offsets, was insufficient consideration for the Delaware cession of its Indiana lands in 1818. The petitioners were awarded $1,627,244.64 "on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." (Final Judgment, Docket No. 337).

By 25 USCA §§ 1181-86 Congress adopted a distribution plan for payment of this judgment entered in Indian Claims Commission Docket No. 337. Section 1181 of that Act provides that persons are eligible to participate in the distribu-

[13] The pertinent provision of the 1874 statute is reproduced in Part C of the Appendix to this opinion.

tion of the award if, *inter alia*, their name or the name of a lineal ancestor (1) appears on the 1906 Delaware per capita payroll (which covers the Cherokee Delawares); (2) is on or eligible to be on the 1940 constructed base census roll of the Absentee Delaware Tribe; or (3) appears on any available census roll or records acceptable to the Secretary, provided that such claimant shows that he is a lineal descendant of Delawares who were members of the Delaware Nation as constituted at the time of the 1818 Treaty (hereafter the "catchall" clause).[14]

The statute's effect was to permit the Cherokee Delawares, the Absentee Delawares, and the Kansas Delawares to share in the distribution of the Docket No. 337 award. Some of the judgment funds were actually distributed to members of those classes prior to the issuance of our preliminary injunction.[15] Some 1500 Munsee Indians applied

[14] 25 USCA § 1181 provides in pertinent part:

> The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States.

[15] See Plaintiff Weeks' Complaint, para. 15; Defendant Cherokee Delawares' Answer, Twelfth Defense, para. 15; Defendants Secretary and Absentee Delawares' Answer, para. 15; Transcript of Preliminary Injunction Hearing, 111, Pl. Ex. 15.

The claims by the Cherokee Delawares were made through the 1906 per capita payroll referred to in § 1181(b). This payroll was

for payments under the award in Docket No. 337, but were denied participation by the Bureau of Indian Affairs at the area level. Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior

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compiled for the purpose of distributing $150,000 appropriated by Congress as settlement for twelve lawsuits filed by the Cherokee Delawares against the United States. Act of April 21, 1904, 33 Stat. 189, 222. One of the suits concerned the hunting "outlet" in Kansas that was ceded by the Delawares to the United States under the 1854 Treaty. See United States v. Delaware Tribe of Indians, 427 F.2d 1218, 1229 (Ct. Cl. 1970). A number of the Kansas Delawares contended that they were entitled to share in this settlement, but were denied participation on grounds similar to some of those argued in the present case, including, *inter alia*, the fact that the 1904 Act (appropriating the funds) directed that payment was to be made only to the "Delaware Tribe of Indians residing in the Cherokee Nation" (33 Stat. 189, 222). See Defendants Secretary and Cherokee Delawares' Ex. 18, Ltr. of 1/25/1905, p. 2; Ltr. of 3/22/1905, p. 2. As a result, the 1906 per capita payroll (also referred to in 25 USCA § 1292(c)(1)) limited the distribution of the settlement to only those Delawares who were descendants of the original 985 registered Delawares enrolled on the 1837 Register (i.e., the Cherokee Delawares). *Id.*, Ltr. of 8/14/1905, p. 1; Ltr. of 1/12/1906, p. 2.

The Absentee Delawares made their claims under § 1181(c). A 1956 Resolution of the Absentee Delaware Tribe provides that the January 1, 1940 census roll shall be used as the base for determining tribal membership. The "constructed base census roll" was formed by taking the names of persons shown to be of Delaware blood and adding thereto the names of persons, such as brothers or sisters, who were eligible to be on the 1940 census roll but were not listed (Defendants Secretary and Cherokee Delawares' Ex. 4, p. 12).

The Kansas Delawares could not, of course, base their claims under the 1906 per capita payroll. Their ancestors did not remove to the Cherokee lands and did not sign the 1867 Register of Cherokee Delawares. Nor could the Kansas Delawares claim under the Absentees' 1940 census roll. Their claims in Docket No. 337 were and are based upon the "catchall" clause in § 1181(d), since, by historical fact, they are lineal descendants of the Delaware Nation as constituted in 1818.

and Insular Affairs, 92d Cong., 2d Sess. 95-96 (March 13, 1972) (Pl. Ex. 6).

The plaintiff Kansas Delawares do not contest the Absentees' right to share in Docket No. 337 relating to the 1818 wrong but they do challenge the inclusion of the Cherokee Delawares in the distribution of this award, as well as that relating to the 1854 wrong, on two Fifth Amendment grounds. Essentially they argue that the inclusion of the Cherokee Delawares in the distribution of the award in Docket No. 337 (1) invidiously discriminates against those persons who are entitled to share in the award (i.e., the Kansas Delawares and the Absentee Delawares), and (2) deprives such persons of their property without just compensation.

Dockets Nos. 72 and 298 - 25 USCA §§ 1291-97

The Absentee Delawares in Docket No. 72, and the Cherokee Delawares in Docket No. 298, brought separate identical suits in the Indian Claims Commission for a general accounting upon all Delaware treaties with the United States. In previous proceedings the Commission had decided, and the Court of Claims had agreed, that both groups were entitled jointly to represent the entire Delaware Tribe.[16] Hence, the two cases before the Commission were consolidated.

Although originally filed as a general accounting, the issue in the case was subsequently narrowed to an accounting for that part of the 1854 Treaty concerning what was known as the Delaware trust lands. It was conceded by the Government, and the Commission found, that in 1856 and 1857 the United States did not carry out the treaty provision calling for the sale of the trust lands at public auction. The principal issue tried was how much additional monies

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[16] See Delaware Tribe of Indians v. United States, 128 F.Supp. 391, 399 (Ct. Cl. 1955).

the trust lands would have brought if the treaty had not been breached, and the lands had been properly sold at auction. The Commission determined that amount to be $1,385,617.81. It further found that the plaintiffs were entitled to recover damages of five (5) percent per annum simple interest on the principal sum from April 30, 1857 to the date of payment. As of August 31, 1969, the principal sum plus interest totaled $9,168,171.13.[17]

By 25 USCA §§ 1291-97 Congress adopted a plan for distribution of the award entered by the Indian Claims Commission in Dockets Nos. 72 and 298. Section 1292 of the Act provides only two methods by which persons may show they are eligible to share in the distribution: (1) by the 1906 per capita payroll embracing the Cherokee Delawares; and (2) by the 1940 census roll of the Absentee Delawares.[18] These two rolls, identical to those in 25 USCA § 1181(b) and (c), allow only the Cherokee and Absentee Delawares

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[17] On September 10, 1969, the Indian Claims Commission ordered that

> the plaintiffs shall have and recover of and from the defendant as a final judgment the sum of $9,168,171.13 plus an additional amount of damages measured by simple interest at the rate of 5% per annum on the principal sum of $1,385,617.81 from August 31, 1969 to the date of payment of the principal sum. (Final Award, Dockets Nos. 72 and 298.)

[18] 25 USCA § 1292 provides:

> The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:
>
> (a) they were born on or prior to and were living on October 3, 1972; and
>
> (b) they are citizens of the United States; and
>
> (c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

to participate in the distribution of the award in Dockets Nos. 72 and 298. Section 1292 contains no "catchall" provision similar to 25 USCA § 1181(d) that would enable the Kansas Delawares to share in the fund by showing their lineage from Delaware ancestors who were members of the tribe at the time of the wrong under the 1854 Treaty.[19]

The Kansas Delawares, reported to us as numbering over 600, note 3, supra, challenge their exclusion from § 1292 as an invidious classification in violation of the Due Process Clause of the Fifth Amendment and equal protection principles applied under the Amendment. It is this constitutional claim which we are persuaded to uphold.

The plaintiff Kansas Delawares also challenge their exclusion from distribution under § 1292 on another Fifth Amendment ground—that the exclusion amounts to a taking of their vested rights without just compensation.

Finally, they challenge the inclusion of the Absentee Delawares and the Cherokee Delawares in the distribution of the award, it again being argued that such inclusion discriminates against the Kansas Delawares and deprives them of property without just compensation.[20]

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[19] Despite the restrictive terms of the statute, plaintiff Weeks applied for participation in the award Dockets Nos. 72 and 298 (Pl. Ex. 136a). Her application was rejected by the Bureau of Indian Affairs, and her appeal therefrom was denied by the Department of the Interior (Pl. Ex. 4).

[20] Section 1294 of the Act divides the Dockets Nos. 72 and 298 funds between the Absentee and Cherokee Delawares on a per capita basis. Ninety (90) percent of the funds apportioned to each of the two groups is to be paid out to individuals on a per capita basis. The other 10% remains to the credit of the governing bodies of each of the respective tribes to be expended for uses approved by the Secretary.

In addition to their other objections to all of the plaintiff Kansas Delawares' claims, the Absentee Delawares have moved for partial final judgment under Rule 54 F.R.Civ.P. as to the 10% of the portion of the award to remain to the credit of the Absentee Delaware Tribe of Western Oklahoma pursuant to § 1294(a). Their

For reasons discussed in Part IV we do not agree with these latter objections of the Kansas Delawares to the inclusion of the Cherokee Delawares and the Absentee Delawares in the distribution of the awards.

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position is that the plaintiff Kansas Delawares have waived any claim as to said 10% of the portion of the award remaining to the credit of the Absentee Delaware Tribe, pointing to a letter introduced by plaintiffs, from the Assistant Solicitor for Indian Affairs, Department of the Interior, to plaintiffs' counsel (Pl. Ex. 137). The letter states that approval of attorneys fee contracts is not required on

> the specific understanding that you do not seek for your clients any part of the judgment funds in Dockets 72 and 298 which are reserved for tribal use by . . . 25 U.S.C. § 1291 *et seq*, but rather seek only their participation in the per capita distributions authorized by [25 USCA §§ 1181-86 and 1291-97]. . . .

They also argue that plaintiffs' various instruments filed in this case have not asserted a claim against the 10% portion set aside for the Absentee tribal body.

We are denying the motion for partial final judgment. Regardless of whether such waiver occurred, based on the pleadings of plaintiffs it is clear the Kansas Delawares have challenged the constitutionality of the statute and have asked that we enjoin distribution under it. See Plaintiffs' Brief on Motion for Partial Final Judgment for Absentee Delaware Tribe of Western Oklahoma, at 5 (filed 7/9/75); Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 70, 71 and 73. For reasons stated in Part V of this opinion, we must hold that 25 USCA §§ 1291-97 is not severable, and that the unconstitutional exclusion thereby of the Kansas Delawares renders the statute invalid as a whole.

With respect to the Cherokee Delawares, the position of the plaintiffs is not clear as to the 10% provision in § 1294(b). See Brief of Plaintiff in Support of Motion for Summary Judgment, at 11-12 (filed 4/16/74). Nevertheless, as stated, the plaintiffs do attack the constitutionality of the distribution statute, at least because of their exclusion, and ask that distribution under the Act be enjoined.

In § 1294(b) there is a proviso that the Secretary shall not approve the use of the funds given to the Cherokee Delaware Tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interest of its members. We have been informed by a recent certificate that the

We turn from this factual background to the legal issues that are raised.

II

Jurisdiction and Justiciability

By numerous motions the defendants have asserted that this court is without jurisdiction of the subject matter and that only nonjusticiable issues are presented. Essentially they argue that the case does not present a substantial federal question because it involves only an intra-tribal dispute not subject to judicial review. They urge two distinct theories of sovereign immunity. They argue nonjusticiability, claiming that plaintiffs raise only political questions concerning the plenary power of Congress to define Indian tribal membership, and that plaintiffs challenge non-reviewable appropriation statutes. We are not persuaded that the theories bar decision of the merits of the constitutional claims of the plaintiff Kansas Delawares.

Subject Matter Jurisdiction and The Intra-Tribal Dispute Cases

First, defendants assert that there is no substantial federal question presented, arguing that this controversy involves only intra-tribal matters not within the jurisdiction of the court, citing Groundhog v. Keeler, 442 F.2d 674 (10th Cir.); Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir.); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir.) and Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir.), among other cases.

Secretary has made such finding with respect to the Delaware Tribal Business Committee. We are asked by the Cherokee Delawares to approve the finding, but that function is not within our issues or appropriate in our disposition and we are denying the motion for this relief.

The complaints allege, *inter alia*, that the statutory exclusion of the Kansas Delawares was an unconstitutional and arbitrary deprivation of valuable property rights and a denial of equal protection, depriving plaintiffs of due process in violation of the Fifth Amendment (Plaintiff Weeks' Complaint, paras. 21 and 23; Plaintiffs Frazier and Rattler's Complaint, paras. 13 and 25). These averments and the complaints as a whole present causes of action clearly arising under the Federal Constitution and within the jurisdictional grant in 28 USCA § 1331. See Baker v. Carr, 369 U.S. 186, 198-99. Defendants challenge jurisdiction, however, contending that the cases cited demonstrate lack of a substantial federal question because only an intra-tribal dispute is involved.

Defendants rely heavily on Groundhog v. Keeler, 442 F.2d 674 (10th Cir.). The court there dismissed a challenge to a chief's appointment under a federal statute authorizing the President to appoint the Principal Chief of the Cherokee Tribe. The court reviewed authorities recognizing "that Congress has exclusive and plenary power to enact legislation with respect to the Indian Tribes." *Id.* at 678. It was concluded that a jurisdictional dismissal was appropriate since the claim was "so lacking in substance and so contrary to well established law" that it afforded no substantial basis for federal jurisdiction, citing California Water Service Co. v. City of Redding, 304 U.S. 252, 255, and Ex Parte Poresky, 290 U.S. 30, 32. See 442 F.2d at 678, n.7.

We recognize the validity of the conclusion upholding congressional power to authorize the appointment of the chief. However, our cases are not disposed of by such reasoning. We do not find any authority unmistakably sustaining congressional authority to exclude one group of Indian descendants from benefits conferred broadly on others who apparently stand on equal footing. No previous decisions make it clear that the constitutional claims before

us are obviously ~~without~~ merit. Levering & G. Co. v. Morrin, 289 U.S. 103, 105.

For similar reasons we find the remaining authorities and arguments unpersuasive as a challenge to jurisdiction. *Martinez, supra,* and *Puckkee, supra,* involved controversies between individual Indians and tribal entities over the official actions of the tribe. The cases are readily distinguishable since the challenges posed there were to a tribal decision or policy, and not to federal statutes. *Martinez* concerned an individual attack on a tribal decision excluding the plaintiff from tribal membership; *Puckkee* challenged the distribution of an Indian Claims Commission award where the distribution scheme fixed by the tribal council excluded the plaintiffs; and the *Prairie Band* case sought to bar approval of a tribal distribution plan. As the cases involved essentially intra-tribal disputes over decisions by tribal authorities, the courts found no substantial federal question arising under 28 USCA § 1331. See *Martinez,* 249 F.2d at 919; *Puckkee,* 321 F.2d at 770; *Prairie Band,* 335 F.2d at 367. In contrast, this section involves a substantial challenge to congressional rather than tribal action.[21]

We are persuaded that the Kansas Delawares present substantial constitutional claims under the Due Process Clause—claims deserving consideration on their merits. And since we are also convinced that the claims are justiciable, as explained below, we feel the case is properly here under 28 USCA § 1331. See Baker v. Carr, 369 U.S.

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[21] Although the controversy here might be denominated one as to "tribal membership" in the broad sense of the term, that alone does not render it an "intra-tribal" dispute. The *Martinez* opinion itself recognized that the question of tribal membership for disposition of funds could, as a result of federal legislation, become a matter of federal rather than tribal supervision. See 249 F.2d at 918, 920.

at 198; see also, Powell v. McCormack, 395 U.S. 486, 512-13.[22]

Sovereign Immunity

The defendants' motion to dismiss the suit as against the United States has been granted since there is no consent to such a suit. [Order, Nov. 1, 1974]. The situation differs, however, with respect to the case against the Secretary. The doctrine of sovereign immunity does not insulate federal officers from suit when the case seeks to enjoin threatened action by a federal officer under an unconstitutional statute. See Larson v. Domestic and Foreign Corp., 337 U.S. 682, 690. We therefore rejected the governmental sovereign immunity defense as to the Secretary.

In our Weeks case it is objected that the tribal business committees which are sued are immune from suit. It is true that the Indian Nations are exempt from suit without congressional authorization. United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 512; Turner v. United States, 248 U.S. 354, 358. Nor may a tribe be sued indirectly by suing tribal officers or the United States as trustee or

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[22] In their answers defendants deny the jurisdictional amount allegations. However, the objection has not been pressed by argument or brief and we find it without merit.

As discussed above, this case properly proceeds as a Rule 23(b)(1)(B) class action. The decisions in Snyder v. Harris, 394 U.S. 332 and Zahn v. International Paper Co., 414 U.S. 291 impose prohibitions against aggregation of claims in class actions. Those decisions, however, concern Rule 23(b)(3) class actions and present no obstacle to the aggregation of claims when a common and undivided interest is present. Gallegher v. Continental Insurance Co., 502 F.2d 827, 831 (10th Cir.); see also Berman v. Narragansett Racing Association, 414 F.2d 311, 314-15 (1st Cir.), cert. denied, 396 U.S. 1037. Should the plaintiff class of Kansas Delawares prevail in this litigation, their right to share in the benefit of the award will have been determined. Still, a formula will have to be determined by statute and no individual recoveries can be, or are now, sought. See *Berman, supra* at 315-16.

guardian of the tribe. Barnes v. United States, 205 F.Supp. 97, 100 (D. Mont.).

However, the Weeks complaint alleges as to the Cherokee Delaware and Absentee Delaware committees that each of the members of the committee (being separately named) is a Delaware Indian and that they are each a representative of their respective sub-classes, the Cherokee Delawares and the Absentee Delawares. The Indian defendants are not immune from suit in their individual capacities. See Chemah v. Fodder, 259 F.Supp. 910, 914 (W.D. Okla.). We feel we may entertain the suit against the individually named Indian defendants, in their individual capacities, and that we may also properly recognize them as representatives for class action purposes under Rule 23(b)(1)(B) and 23(b)(2) and enter a proper declaratory judgment of the right of the individuals constituting the classes. We grant no relief against the tribes or their tribal authorities as such, and our judgment should not be construed as a binding adjudication affecting them.

The Argument of Non-Justiciability and the Plenary Power of Congress Over the Status of Indian Tribes

Defendants argue that only non-justiciable issues are presented due to implication of the plenary power of Congress to define Indian tribal membership.

Without doubt, plenary authority has been exercised by Congress from the beginning over tribal relations of the Indians and the power has been deemed a political one, not subject to control by the judicial department. Lone Wolf v. Hitchcock, 187 U.S. 553, 565; see also National Indian Youth Council v. Bruce, 485 F.2d 97, 99 (10th Cir.). However, we are cautioned that "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry." Baker v. Carr, 369 U.S. 186, 210-11. As in other contexts, there is no blanket rule as to justiciability where legislation affecting the status of Indians is challenged. *Id.* at 215-16. Analysis

must be made of the threads of the political question doctrine to determine whether they catch this controversy. *Id.* at 211. Generally, we must first consider whether the constitutional claim presented and relief sought are of the type permitting judicial resolution, and second, whether there may be a "political question" that is not justiciable because of the separation of powers. Powell v. McCormack, 395 U.S. 486, 516-17.

In considering the first question, we note that the constitutional claims essentially are that the distribution statutes violate the Fifth Amendment's protections against unlawful taking and against denial of due process, implicating equal protection principles. See Weinberger v. Wiesenfeld, —— U.S. ——, 43 U.S.L.W. 4393, 4394 n.2. Such a claim of discriminatory classification is of a type regularly considered and decided by the courts. As the Court observed in rejecting the non-justiciability argument in Baker v. Carr, 369 U.S. at 226:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to letermine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Moreover, the relief sought is not unfamiliar. An injunction against threatened unconstitutional action by a governmental officer is within the proper equitable remedies of the court, see Lane v. Pueblo of Santa Rose, 249 U.S. 110, 113-14, and the separate remedy of a declaratory judgment is also familiar. Powell v. McCormack, 395 U.S. 486, 517-18. We are convinced that the first general test of justiciability is satisfied.

Our second inquiry—whether there is a non-justiciable "political question" because of constitutional separation of powers—involves more detailed considerations. We must consider whether there is a bar to judicial dis-

position because of a constitutional commitment of the issue to a coordinate political department, lack of judicially discoverable and manageable standards for resolving the question, or an impossibility of decision without an initial policy determination of a kind clearly for non-judicial discretion, *inter alia*. See Baker v. Carr, 369 U.S. 186, 217; see also Powell v. McCormack, 395 U.S. 486, 518-19.

Of course, there is explicit constitutional authorization for congressional action in dealing with Indian affairs in the provision for Congress "To regulate commerce . . . with the Indian Tribes." And the functions relating to treaties conferred on the President and the Senate by Art. II, § 2, Cl.2, have often been the source of power to deal with the Indian tribes. See Morton v. Mancari, 417 U.S. 535, 551-52; McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172, n.7; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66.

The authority conferred upon the other branches for dealing with the Indian Tribes by treaty is involved indirectly in this case in the sense that the historical background for the Delaware awards in question include several treaties with the Tribe, as discussed earlier. There is, however, in the distribution statutes no present policy determination of the sort involving the treaty making function. Instead these recent enactments deal with equitable distribution following a judicial award, and proper classifications for the distribution. There is the additional view that enactments dealing with Indians involve the relationship of a ward to his guardian, and there is an element of such a relationship touched on by § 1294.[23] Baker v. Carr,

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[23] We refer to the provision in § 1294(a) and (b) that 10% of the award be withheld for subsequent advancement, expenditure, etc., for any purpose authorized by the tribal governing bodies of the Cherokee and Absentee Delawares and approval by the Secretary of the Interior. 25 USCA §§ 1294(a), (b). This portion of the statute is affected by our decision only because of our conclusion that the distribution statute, which has no separability clause, must be held invalid as a whole. See Parts III and V, *infra*.

369 U.S. 186, 215; see also Lone Wolf v. Hitchcock, 187 U.S. 553, 567. However, the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress.

We have touched earlier on the availability of familiar standards for deciding the constitutional claims presented here. We are persuaded that the claims invoke familiar due process and equal protection principles. In several instances the courts have reached the merits of due process claims of a similar sort. *E.g.*, United States v. Jim, 409 U.S. 80; Ute Indian Tribe v. Probst, 428 F.2d 491, 498 (10th Cir.), cert. denied, 400 U.S. 926; Simmons v. Seelatsee, 244 F.Supp. 808, 815 (E.D. Wash. 1965 (three judge court), aff'd mem., 384 U.S. 209; see also McCurdy v. Steele, 353 F.Supp. 629, 637-38 (D. Utah 1973), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

Nor do any of the remaining considerations underlying the political question doctrine apply. Decision on the precise constitutional issues does not involve any disrespect for a political decision by a coordinate branch. And, of course, there is no danger of embarrassment by multifarious pronouncements by two branches as in foreign affairs. See Baker v. Carr, 369 U.S. at 211-13, 217.

For these reasons we are satisfied that, on analysis, the political question doctrine does not bar consideration of the constitutional claims of the Kansas Delawares. They may invoke jurisdiction of the court under 28 USCA § 1331 to decide the validity of the statutory exclusion and inclusions in light of established constitutional limitations. "[T]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Tillamooks, 329 U.S. 40, 54; see also United States v. Klamath Indians, 304 U.S. 119, 123; Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375-76; United States v. Creek Nation, 295 U.S. 103, 109-10; Stephens v. Cherokee Nation, 174 U.S. 445, 578; F. Cohen, Handbook of Federal Indian Law 91 (orig. ed. 1942).

The Objection to Justiciability on the Theory of Nonreviewability of Appropriation Statutes

The Absentee Delawares advance a final argument that nonjusticiable questions are involved because appropriation statutes are challenged, relying on United States v. Price, 116 U.S. 43 and United States v. Jordan, 113 U.S. 418. The plaintiff Kansas Delawares reply that appropriation statutes are not involved. They say that the determination to pay the awards was made in earlier, separate appropriation acts, Pub.L. No. 88-635, ch. IX, Oct. 7, 1964, 78 Stat. 1033-34; Pub.L. No. 91-167, ch. IX, Dec. 26, 1969, 83 Stat. 453, and that the challenged distribution statutes are not appropriation acts. Without deciding this point we consider the argument on the basis that the distribution statutes under attack are a part of the appropriation procedure.

We conclude that the reasoning of the *Price* and *Jordan* cases does not apply. The cases involved determinations that restitution should be made for property taken for wartime purposes and by unlawful taxation, respectively. In both cases the government challenged a prior congressional determination by statute of the government's obligation. In *Jordan* the Court stated that the clear import of the statute was that the amount specified had been collected contrary to the tax regulations involved, and that this congressional determination, made on recommendation of the Secretary of the Treasury, could not be challenged in the subsequent suit. 113 U.S. at 423. Similar reasoning was relied on in the *Price* case.

We have also noted Buchanan v. Patterson, 190 U.S. 353; United States v. Louisville, 169 U.S. 249, and Kruszewski v. United States, 163 F.2d 884 (7th Cir.), cert. denied, 333 U.S. 880, which recognize the principles of *Price* and *Jordan*. In none of the cases, however, is there support for the inference that a statute, because it involves an appropriation function, is unreviewable if a substantial consti-

tutional claim is made that an invidious or irrational classification or exclusion is made by the statute. And, of course, the fact that the spending power is involved does not bar consideration of constitutional issues. See Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 62-78 (1936); Veazie Bank v. Fenno, 8 Wall. 533, 541 (1869); cf. Flast v. Cohen, 392 U.S. 83, 127 (Harlan, J., dissenting). We feel that involvement of the appropriation function is no bar to hearing the merits of the constitutional claims of those excluded by a classification asserted to be invidious and irrational.

Thus, we are convinced that substantial constitutional claims are asserted and that they deserve disposition on their merits. The claims are proper for consideration under familiar judicial standards and none of the facets of the political question doctrine bars judicial review.

III

Constitutionality of the Exclusion of the Kansas Delawares By 24 USCA §§ 1292 and 1294

The plaintiff Kansas Delawares claim that the exclusion barring their participation in the award in Dockets Nos. 72 and 298, redressing the 1854 wrong, is irrational and invidious under the Due Process Clause, and the equal protection principles incorporated therein; and also that the statute takes their vested individual rights without just compensation. We find merit in plaintiffs' first claim, not agreeing however with their unlawful taking theory.[24]

In assessing the claim of the Kansas Delawares that the exclusion amounts to an irrational and invidious classification, we follow equal protection principles applied under the Fourteenth Amendment. See Weinberger v. Wiesenfeld,

[24] It is convenient to address plaintiffs' just compensation claim in Part V of this opinion dealing with equitable jurisdiction and remedies.

420 U.S. 636, 638 n.2, Johnson v. Robinson, 415 U.S. 361, 364-65 & n.4. Since no suspect classification or fundamental interest is involved, our inquiry is whether the classification excluding the Kansas Delawares is rationally related to a legitimate governmental interest, or whether it invalidly excludes a group standing on equal footing with others benefited. Jimenez v. Weinberger, 417 U.S. 628, 636-37; see also Weinberger v. Salfi, —— U.S. ——, —— (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84; McDonald v. Board of Election, 394 U.S. 802, 809.

We approach the question mindful of the presumption of constitutionality that the statute carries. Flemming v. Nestor, 363 U.S. 603, 617. As noted, the award in Dockets Nos. 72 and 298 seeks to redress a wrong to the Delaware tribe from the improper sales of tribal lands in 1856 and 1857. Since the excluded Kansas Delawares trace their descendancy from the injured tribe as of that time, a substantial question as to the rationality of the exclusion is raised. We turn, therefore, to the various justifications for the classifications that have been suggested or may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

The defendants argue that there are several justifications that serve as rational bases for the classifications drawn in 25 USCA §§ 1292 and 1294. When the matter was before the Congress the arguments of the Cherokee and Absentee Delawares for the restrictive classifications centered heavily on their objections to claims of the Munsee groups and the delaying effect those claims had caused in distribution of the award in Docket No. 337 relating to the 1818 wrong. Due to the importance of the legislative history and its focus on the Munsee groups, we will first consider the legislative source materials.[25]

[25] It is proper to examine the legislative history of a statute to see if it discloses a rational basis for the classifications made by

The Legislative History and the Munsee Groups

As noted, the Kansas Delawares did share in the award in Docket No. 337, redressing the breach of the 1818 Treaty, by virtue of a catchall provision in the distribution statute including all persons who "are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 . . ." 25 USCA § 1181(d). Likewise the legislation originally introduced for the purpose of distributing the funds appropriated to pay the award in Dockets Nos. 72 and 298, redressing the breach of the 1854 Treaty, would have included the Kansas Delawares since it proposed to bring current and amend the distribution rolls developed pursuant to 25 USCA § 1181 so as to include all persons who were lineal descendants of members of the Delaware Tribe as it existed in 1854. H.R. 5200, 92d Cong., 1st Sess. § 2 (March 1, 1971); S. 1067, 92d Cong., 1st Sess. § 2 (March 2, 1971).[26]

However, the bill which was ultimately passed by Congress, H.R. 14267, 92d Cong., 2d Sess. (1972) (as amended), narrowed the distribution provision. The distribution

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the statute, see, *e.g.*, Richardson v. Belcher, 404 U.S. 78, 82; United States v. Maryland Savings-Share Inc. Corp., 400 U.S. 4, 6, as well as other grounds of justification that may be conceived. McDonald v. Board of Election, 394 U.S. 802, 809.

This court on its own motion, and with notice to the parties, requested and obtained a legislative history covering the two distribution statues (25 USCA §§ 1181-86 and 1291-97) involved in this case through the assistance of the Administrative Office of the United States Courts and the congressional staffs. These materials were filed with the clerk of the court for examination and comments by the parties.

[26] The use of the updated roll in H.R. 5200 was recommended by the Department of Interior. See House Committee Report accompanying H.R. 14267, H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6).

scheme finally enacted followed the scheme for Docket No. 337, 25 USCA § 1181, except for the crucial difference that the third or catchall provision in § 1181(d) which had allowed the Kansas Delawares to share was omitted from § 1292. Only persons who could trace their ancestry to a described 1906 payroll (*i.e.*, the Cherokee Delawares), or whose name or whose ancestor's name was on, or was eligible to be on, the constructed base census roll as of 1940 of the Absentee Delawares, were included under this distribution provision.

We have examined the legislative history relating to this change in the distribution provisions. The change was made after the Cherokee Delawares and Absentee Delawares objected to the distribution provisions in the bills originally introduced. The substitute distribution provision which was adopted was essentially that proposed by the two tribal groups.[27]

The Cherokee and Absentee Delawares advanced several reasons to Congress for rejecting the distribution provision in the bills originally introduced and adopting instead their narrower proposal referring to the 1906 roll and the constructed roll as of 1940.[28] The underlying problem, which

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[27] See Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 31 ff.; (March 13, 1972) (Pl. Ex. 6) [hereinafter cited as House Subcomm. Hearings]; Hearings on H.R. 5200, H.R. 14267 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4 (May 8, 1972) (Pl. Ex. 7).

[28] See *e.g.*, Letter from Bruce M. Townsend, Chairman of the Delaware Tribal Business Committee (Cherokee Delawares), to Congressman Wayne H. Aspinall, Chairman, House Comm. on Interior and Insular Affairs, Nov. 16, 1971, attached to House Subcomm. Hearings, *supra* n. 27, at 9 ff.; Statement of Louis L. Rochmes, Attorney for the Delaware Tribes, March 13, 1972, attached to House Subcomm. Hearings, *supra* n. 27, at 45 ff.; House Subcomm. Hearings, *supra* n. 27, at 10, 14-18, 21-22, 25,

was cited repeatedly, concerned the Munsee groups. The Munsees were conceded to share common origins with early Delawares in New Jersey, Pennsylvania and Maryland, to whom they were considered related and with whom they formed one cultural group. At least some officials in the Bureau of Indian Affairs had taken the position that certain Munsee Indians should qualify to share in the award in Docket No. 337 under the catchall provision in 25 USCA § 1181 covering all lineal descendants of the 1818 Delaware Nation. The Bureau had indicated that these Munsees might apply for participation in the distribution under this provision and extended various administrative deadlines in order to allow the Munsees to make such applications. It appears that some 1500 Munsees ultimately applied to participate in the award in Docket No. 337, that all 1500 applications had been rejected by the Bureau at the area level, and that some 739 were still pending on appeal at the Bureau in Washington at the time of the hearings on legislation to distribute the award in Dockets Nos. 72 and 298. See House Subcomm. Hearings, *supra* n. 27, at 95-96.

The Cherokee and Absentee Delawares objected that the Munsee Indians, including the Christian Munsees, were not, in fact, descendants of the Delaware Nation as it was constituted in 1818 or in 1854, and that the Bureau's actions in their behalf were unfounded. See House Subcommittee Hearings, *supra* n. 27, at 56-57, 72. Moreover, they objected that there was Bureau solicitation of the Munsees to apply and that subsequent extensions of deadlines for the Munsees' benefit, coupled with the volume of appeals pro-

46-49, 71-74 (testimony of Bruce M. Townsend and Louis L. Rochmes); Hearings on H.R. 15267, H.R. 5200 Before the Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 4-5 (May 10, 1972) (Pl. Ex. 8); Hearings on S. 3113, S. 1067, S. 2249 and S. 2298 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 42-49, 60-61, 69-71 (July 21, 1972) (Pl. Ex. 5) (testimony of Bruce M. Townsend, Harold Pruner and Lawrence Snake).

duced when the Munsee applications were rejected, had unreasonably delayed the complete distribution of the funds in Docket No. 337. They argued that the use of a similar "lineal descendants" provision in the new distribution act for the award in Dockets Nos. 72 and 298 would lead to a repetition of the Munsee problem and that a precise definition of the identity of those entitled to share in the latter award was therefore necessary. See the Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*. Other reasons for the restriction of the award to the Cherokee and Absentee Delawares were also urged and they are considered below in discussing the various bases said to justify the exclusion of the Kansas Delawares.

The Munsee situation was undoubtedly a major factor in Congress' decision to drop the catchall "lineal descendants" provision in § 1292. However, the legislative history indicates that Congress was never apprised that adoption of the Cherokee and Absentee Delaware proposals for limiting the distribution provisions would have the effect of excluding a group of people, such as the Kansas Delawares who were unquestionably lineal descendants of the Delaware Nation of 1854, who had lived on the Kansas Delaware lands, and who had not participated in any judgment to another tribe.[29]

[29] See the statement by Mr. Rochmes, tribal attorney for the Absentee and Cherokee Delawares in response to questions by the committee (House Subcomm. Hearing, *supra* n. 27, at 78-80), Appendix to this opinion, Part A.

There is evidence in our record that at least some of the Cherokee and Absentee Delawares, themselves, were unaware of the existence of the Kansas Delawares at the time they testified before Congress. Mr. Townsend, the Chairman of the Delaware Tribal Business Committee (Cherokee Delaware) and one of the principal witnesses before Congress urging the adoption of a distribution scheme utilizing only the 1906 and 1940 rolls, testified in the course of this litigation that he was unaware of the existence of the Kansas Delawares, as such, until after the passage of 25 USCA §§ 1291-97, when it was discovered that the Kansas Delawares were precluded

As stated, the Congress adopted basically the position of the Absentee and Cherokee Delawares that the award in Dockets Nos. 72 and 298 be divided between their two groups. The committee reports accompanying the pending proposal H.R. 14267 stated that "[t]he Delaware Indians are divided into two groups: the Delaware Tribe, and the Absentee Delaware Tribe of Western Oklahoma." H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 1 (May 22, 1972); S. Rep. No. 92-1126, 92d Cong., 2d Sess. 1 (Sept. 14, 1972) (Defendants Secretary and Cherokee Delawares' Ex. 6 and 7 respectively). The House Report states that the recommendations of the Department of Interior (which had proposed up-dating the Docket No. 337 roll to include persons who are lineal descendants of the Delaware Tribe as it existed in 1854) were strenuously opposed by both groups (the Absentee and Cherokee Delawares), and that "the Indian position is, in the opinion of the committee, a defensible one." *Id.* at 2. Neither the reports nor the floor proceedings of both Houses disclose further reasons or discussion for the classifications in the statute as enacted. See 118 Cong. Rec. S 15063 (daily ed. Sept. 18, 1972); 118 Cong. Rec. H 8700 (daily ed. Sept. 25, 1972).

From our examination of the legislative history we find that the Congress was specifically requested by the Absentee Delawares and the Cherokee Delawares to delete the catchall provision, and that Congress made the decision in response to the urging of those groups. On the record before us, we find that neither Congress nor its committees were made aware that the limitation of distribution to the two rolls would exclude groups which had lived on the Kan-

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from sharing in the award under the statute. Transcript of Preliminary Injunction Hearing, 76, 91, Pl. Ex. 15. Mr. Townsend further testified that he did not think the question of the Kansas Delawares' sharing in the award in Dockets Nos. 72 and 298 was ever brought before or considered by Congress in the course of the legislative hearings on distribution legislation for the award. *Id.* at 82-85.

sas Delaware lands and which could trace their Delaware descendancy as the Kansas Delawares do.[30] Instead the focus was on the Munsee Indian groups, including the Christian Indians,[31] and paramount consideration was given to the Munsee situation in considering the proposed change in the distribution statute.

While we have no question of statutory interpretation before us making germane the legislative history and intent in the usual context, we nevertheless feel these legislative materials are relevant in connection with defendants' claim that the Congress was aware that the classification would exclude some Indians who could ethnologically claim to be Delaware.[32] It is disturbing that the Congress was apparently not aware of the Kansas Delaware group and we are not persuaded that it was not the intent of Congress to exclude a group such as the Kansas Delawares from the distribution.

Suggested rational bases for the exclusion of the Kansas Delawares in 25 USCA §§ 1292 and 1294

We turn to the several justifications advanced by defendants as supporting the rationality of the exclusion of the Kansas Delawares from participating in the award redressing the 1854 wrong.

First, defendants rely on the references in 25 USCA § 1292 to the 1906 Cherokee Delaware roll and the 1940 Absentee Delaware roll. They say that reference to these objective standards in preference to an ethnological standard of lineal descendancy was intentionally chosen to eliminate the possibility of wrongful payment due to deliberate misrepresentations or misunderstanding, to avoid

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[30] See Appendix to this opinion, Part B.

[31] See Article 13 of the 1854 Treaty, 10 Stat. 1048.

[32] See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

delay, and to eliminate the confusion that had arisen in distribution of the Docket No. 337 award. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, 64. We cannot agree, concluding that the argument will not withstand analysis of the statutes and factual circumstances, or the constitutional protections against discriminatory classifications made clear by the Supreme Court.

We have noted earlier that complaints made to Congress in connection with delay and controversy, among other things, were directed at the Munsees,[33] and not at the Kansas Delawares. The testimony indicated that approximately 300 Kansas Delawares shared in the earlier Docket No. 337 award redressing the 1818 wrong (Transcript of Preliminary Injunction Hearing, 103-04, Pl. Ex. 15), and the legislative history before us reflects no complaints of delay or controversy in connection with the participation by these Kansas Delawares in the distribution of that award.

Moreover, in response to requests for deadlines to avoid delay, the enactment providing for distribution of the Dockets Nos. 72 and 298 award included limitations of four months for applications for enrollment, 60 days for rejection by the Secretary, 30 days for appeal, and 60 days for determination of an appeal, 25 USCA § 1293. This protection against delay and controversy moots the substance of defendants' arguments. In these circumstances the suggested considerations of administrative convenience cannot support the exclusion of the Kansas Delawares. The arguments must fall in view of the admonition in Stanley v. Illinois, 405 U.S. 645, 656:

> The establishments of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

[33] See Letter of Mr. Townsend and Statement of Mr. Rochmes cited n. 28 *supra*.

We are also unconvinced by the suggested rationale of avoidance of spurious claims. It is true that § 1292 refers to two existing 1906 and 1940 rolls. However, the suggested potential of spurious claims is not eliminated since the standards of entitlement were not confined within the compass of objective records. The Secretary was required by § 1292 to prepare a distribution roll of Absentees living on October 3, 1972, who were United States citizens, and who could show that:

> (2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware tribe of Western Oklahoma, approved by the Secretary. (25 USCA § 1292(c)(2))

It is clear that under the § 1292 criteria an Absentee Delaware could apply for enrollment under § 1293 [34] and partake in the distribution of the award if he could show that his name or that of his "lineal ancestor" was on or was "eligible to be on" the constructed base census roll as of 1940. Thus it was open to an Absentee to show entitlement by ethnological proof of Delaware blood lines

[34] Applications are required to be made by § 1293 to an Area Director. The applications are considered by the Secretary under the § 1292 criteria to determine eligibility for listing on the distribution roll of persons entitled to share in the distribution of the award.

even though neither his name nor that of his ancestor actually appeared on the described roll.[35] This proof is not limited to objective records. Moreover, we note that both Cherokee and Absentee Delawares could show entitlement for § 1292 purposes if the name of their "lineal ancestor" was on the described rolls—a showing that again would involve tracing Delaware lineage subsequent to and outside the described rolls.

The prevention of spurious claims is recognized as a legitimate governmental interest in connection with classifications. See Jimenez v. Weinberger, 417 U.S. 628, 636. Here, however, as in *Jimenez,* the effect of the statute is to create subclasses which are treated unequally. For example, members of the Absentee Delaware subclass can

[35] The method of preparation of the Absentee "constructed base census roll as of 1940" included listing persons shown to be of Delaware blood who were *eligible* to be on the 1940 roll of Caddos and Absentee Delawares, but were not listed. The method of preparation of the "constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma approved by the Secretary of the Interior," 25 USCA § 1181(c), is described in the Senate Report accompanying H.R. 16402 as follows (S.Rep. No. 1518, 90th Cong., 2d Sess. 12 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 4)):

> Membership in the Absentee Delaware Tribe is governed by a resolution adopted by the tribe on December 22, 1956, and approved by the Acting Assistant Commissioner on July 30, 1957. The resolution provides that the January 1, 1940, census roll shall be used as the base for determining membership in the tribe. That roll is the census of the Wichita and Affiliated Bands of Indians (Caddo and Absentee Delaware). In constructing the base census roll referred to in section 1(c) of the proposed bill, the tribe has taken from the 1940 roll the names of persons shown to be of Delaware blood and has included the names of persons, such as brothers and sisters, who were eligible to be on the 1940 roll but were not listed. The base roll which has not yet been approved lists 331 individuals. The executive committee estimates that the membership roll as of January 1, 1967, will contain approximately 800 names.

show entitlement to participate by proof of Delaware lineage, independent of any roll, through proof that an ancestor was "eligible" to be on the constructed base census role as of 1940, although not listed. But members of the other subclass, consisting of those like the Kansas Delawares, are denied the opportunity to make a showing of entitlement through proof of Delaware lineage in any way on the suggested rationale that the statute furthers the interest of prevention of spurious claims. The rationale is untenable "since the potential for spurious claims is exactly the same as to both subclasses." Jimenez v. Weinberger, *supra,* 417 U.S. at 636.[36]

Thus, in the circumstances before us, we cannot agree that considerations of the avoidance of potential fraud, delay and controversy, or of easing administrative burdens, justify the discriminatory exclusion of the Kansas Delawares. See Jimenez v. Weinberger, *supra,* 417 U.S. at 635-37; Stanley v. Illinois, 405 U.S. 645, 658; Reed v. Reed, 404 U.S. 71, 76.

Second, it was argued before Congress and the Court that a proper reason for limitation of distribution of the award to the Cherokee Delawares and Absentee Delawares is found in the final award of Indian Claims Com-

[36] The dimensions of the problem viewed from the numbers of the three groups involved do not indicate that the Kansas Delawares would present more difficulties than the other groups. It was testified before us that the Bureau of Indian Affairs has advised that 7,765 Cherokee Delawares and 1,808 Absentee Delawares had been approved for participation in the award at the time of the preliminary injunction hearing in March, 1974 (Transcript of Preliminary Injunction Hearing, 109, Pl. Ex. 15). As earlier noted, it has been reported to us that the identities of approximately 678 Kansas Delawares were known to the plaintiff Weeks (see note 3 *supra*). Approximately 300 Kansas Delawares shared in the Docket No. 337 award, according to the testimony (Transcript of Preliminary Injunction Hearing, 103-04). And, as stated the complaints as to delay were related to the Munsee groups, not to the Kansas Delawares.

mission in Dockets Nos. 72 and 298. The argument is that whereas the award in Docket No. 337 was made to "the petitioners on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818", the award in Dockets Nos. 72 and 298 was made to the "plaintiffs," who were the Cherokee and Absentee Delawares.

We cannot agree with the inference drawn from the form of the award. In its first finding of fact in Dockets Nos. 72 and 298 the Commission stated:

> 1. Plaintiffs, Absentee Delaware Tribe of Oklahoma et. al. in Docket No. 72, and the Delaware Tribe of Indians in Docket No. 298, are entitled under the Act of August 13, 1946, 60 Stat. 1049, *to jointly represent the entire Delaware Tribe in its claim against the United States.* (emphasis added)

In addition the opinion of the Commission refers to its earlier determination (2 Ind. Cl. Comm. 253), that "these two groups were entitled jointly to represent the entire Delaware Tribe." 21 Ind. Cl. Comm. 344, 345.

The finding of the representative capacity in which the plaintiff groups brought suit accords fully with the procedure laid out by the Indian Claims Commission Act, 60 Stat. 1049, 25 USCA §§ 70-70v. The Commission's function is defined as hearing and determining claims "on behalf of any Indian tribe, band, or other identifiable group of American Indians" 25 USCA § 70a. This function is basically to identify the injured tribal entity, making plain the time of the wrong and the injured group. Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 52. "[T]he ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity." Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). In view of the Commission's finding and the procedural scheme we

must read the reference to the "plaintiffs" in the Commission's award in Dockets Nos. 72 and 298 as being to them in a representative capacity on behalf of the entire Delaware Nation as compensation for the 1854 wrong.

Defendants offer a related argument that the law requires that awards of the Indian Claims Commission be made to existing Indian tribes and not to individual descendants of the tribe as it existed at the time of the wrong, relying on Minnesota Chippewa Tribe v. United States, 315 F.2d 906 (Ct. Cl.). This purported rule of law is suggested as a rational basis for the statutory exclusion. We must disagree, concluding that the Court of Claims decisions do not support the position of defendant.

Before the Congress defendants pointed to statements in Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 913-14 (1971):[37]

> Tribal lands are communal property in which the individual members have no separate interest which can pass to their descendants who are no longer members of the group. (*Id.* at 913)
>
> At least in such proceedings the Indian Claims Commission Act requires that the awards be made, not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today. (*Id.* at 914)

The court's opinions since *Minnesota Chippewa* make it clear that the Commission's functions are limited to identifying the injured tribal entity, making plain the time of the wrong and the injured group. See Cherokee Freedman v. United States, 195 Ct.Cl. 39, 52 (1971). The court has stated that the Commission is to leave to the Congress and its agents the decision of the composition of the in-

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[37] See the Statement of Mr. Rochmes cited n. 28 *supra*.

jured tribe and the designation of those entitled to participate in the judgment. *Id.*

In Red Lake & Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936, 944 (Ct. Cl. 1965), the court discussed the *Minnesota Chippewa* case and others and the Commission's proper function:

> The court held that, since the claim was on behalf of the entity, the award must run to the entity, not to individual persons or descendants. This was to make it clear, first, that the claim is a group not an individual demand, and, second, that nothing in the Indian Claims Commission Act bars any current member of the represented group from benefiting or requires the inclusion of descendants who are not now such members. Those questions are left open by the Act. The determinations of 'how the award is to be paid and precisely who can participate in an award' remains for Congressional and administrative determination—the Indian Claims Commission Act standing wholly aside from that extra-judicial resolution. Peoria Tribe of Indians v. United States, supra. *The form of the award should not pre-determine the persons who will benefit from the award to the group—as it might do if there were binding references to descendants of past members or comparable individualization of the decree.* (emphasis added)

And in Cherokee Freedmen v. United States, 195 Ct. Cl. 39 (1971), the court made clear the limitations on the functions of the Commission and the Court of Claims again:

> A third separate problem in this family of related topics is the composition of the particular entity or group in whose favor an award is made under the Claims Commission Act—whether specific individuals, classes of persons, or subgroups saying that they are

> members or components of the prevailing group are entitled to participate in the judgment. Those questions we have consistently held, from the beginning of litigation under the Act, to be beyond the competence of the Commission and this court; they are reserved for Congress or for authorized administrative resolution when the award is paid. (*Id.* at 46)
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> *We have always taken pains to assure that any group or person claiming a right to participate (at least colorably) in a judgment under the Act not be totally excluded, either by the form of the award or by the restrictive nature of the entity to which the award goes in name.* Since Congress (or its agent) is to settle disputes as to the composition of, or membership in, the group entitled to the money, the Commission's judgment should not bar an individual or entity from urging before the other branches a right to share on the ground of such membership. (*Id.* at 48) (emphasis added.)
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> • • •
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> The third protective device is to make clear—as we do now and as the Commission should also do in its final decision—the identity of the injured tribal entity. That is well within the authority of court and Commission under the Claims Commission Act (see McGhee, Yuchi, Red Lake and Pembina Bands, and the other decisions cited supra), and it will be that entity whose composition will be decided by Congress or its designee. (*Id.* at 52)
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> • • •
>
> The award itself need not say in precise terms that it is for the benefit of the Cherokee Nation "as it existed or was constituted before 1893 (or from 1872-1893)" so long as it is plain that that is the time and the group involved. ***The other branches of government can then decide the composition of the Cherokee tribe as of that period.*** **(*Id.* at 52) (emphasis added.)**

See also Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974).

Hence, we are satisfied that the Commission's authority does not extend to designating the beneficiaries of its awards. This is further reason why we feel the Commission did not intend or make a designation of the Cherokee and Absentee Delawares as the beneficiaries of the award in Dockets Nos. 72 and 298, and that its reference to the "plaintiffs" was merely in the sense of their representative capacity of the injured tribal entity. In this case neither the award nor the decisions of the Court of Claims relied on bears on the question of designation of beneficiaries of the Commission's awards; and they may not serve here as a rational basis for the statutory classifications made by Congress.

Third, defendants argue that rationality of the exclusion lies in the fact that the Kansas Delawares gave up any right to share in future Delaware tribal assets by voluntarily electing to sever their tribal membership pursuant to Article IX of the 1866 Treaty with the Delaware Indians, 14 Stat. 793, 796.[38]

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[38] Defendants point to the last sentence of Article IX describing the effect of an election by a Delaware to become a United States citizen:

> There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

Defendants contend that a similar severance of tribal membership and membership rights was made by statute in 1874 (18 Stat. 146,175) as to Kansas Delawares who were minors in 1866. Plaintiffs disagree, arguing that the statute did not have the effect of

We are not persuaded that any previous waiver or surrender of rights prejudices the Kansas Delawares with respect to this award. Article IX of the 1866 Treaty expressly provided that any Delaware electing to become a citizen would receive patents and his "just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States." 14 Stat. at 796. Had the United States fulfilled its obligations in good faith under the 1854 Treaty, the Kansas Delawares on electing citizenship would each have received their just proportion of the increased proceeds of the land sales in 1856 and 1857. The award in Dockets Nos. 72 and 298 was clearly intended to redress the injury and diminution of proceeds from those sales.

We find it a strained interpretation of the 1866 treaty to say that the Kansas Delawares waived any rights to share in such a future award as is involved here. The language of the treaty does not impel such a result and there was no showing that the Indian victims were aware of the wrong done them in the sale of the Delaware lands. "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." Choate v. Trapp, 224 U.S. 665, 675; see Antoine v. Washington, 420 U.S. 194,200; Choctaw Nation v. Oklahoma, 397 U.S. 620, 631.[39] We cannot accept the waiver argument as a justification for the exclusion.

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severing the minors' membership in the Delaware Tribe. However we feel we need not resolve this question in view of our disagreement with the defendants' basic position that adults' or minors' rights in connection with the award in Dockets Nos. 72 and 298 were surrendered or waived by the earlier acts of their ancestors or by the intent of the 1874 statute and the 1866 Treaty provisions.

[39] What has been said also disposes of a related point concerning Article IX of the 1866 Treaty. It is argued that Article IX limited

Fourth, it is argued that rationality for the distribution statute may be found in Article 8 of the 1854 Treaty with the Delawares, 10 Stat. 1048, 1050. This provision states that:

> Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

Defendants argue that this reservation of legislative power by the Congress permits the statutory exclusion of the Kansas Delawares from participation in the award.

Again, construing the treaty as the Indians would have understood it, Choctaw Nation v. Oklahoma, *supra,* 397 U.S. at 631, the inference that any use made of this reserved power must be sustained, is unjustified. Article 8 cannot be said to have reserved or conferred power to prejudice Indian rights without regard to constitutional limitations. We have earlier noted that the plenary power of Congress to regulate Indian affairs is subject to constitutional limitations, see United States v. Klamath Indians, 304 U.S. 119, 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F. Supp. 629, 637 & n.12 (D.Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.). The provisions of Article 8 likewise may

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the Kansas Delawares to their just proportion of credits "*then held in trust* by the United States (emphasis added), and precludes their asserting any rights thereafter to such funds, including the award here." Again, the inference of a waiver or surrender of a right to future redress by the award is untenable. This treaty provision likewise does not impel such an interpretation, and it would violate the cited long-standing canon of construction of Indian treaties. And, as noted, there was no showing of awareness by the Indians of the wrong.

not be construed to reserve a power immune from constitutional limitations.

Fifth, defendants say that the plenary power of Congress over Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. Defendants contend that the provisions of the later statute—here the distribution enactment—superseded prior treaty provisions and statutes, citing, *inter alia,* Choate v. Trapp, 224 U.S. 665, 670-71; Lone Wolf v. Hitchcock, 187 U.S. 553, 566; Thomas v. Gay, 169 U.S. 264; and Ward v. Racehorse, 163 U.S. 504. Defendants argue, contrary to plaintiffs' position, that in light of this unilateral power of Congress to amend or modify treaties and statutes, no "vested rights" were created in favor of the Kansas Delawares by the 1866 Treaty. Defendants conclude that any rights of the Kansas Delawares have been lawfully abrogated by the distribution statute, 25 USCA § 1292, under authority recognized in United States v. Jim, 409 U.S. 80, and Gritts v. Fisher, 224 U.S. 640.

We cannot agree with the inferences drawn. The issue is not whether such power is held by the Congress to abrogate treaties or to control distribution of tribal property. Instead, the issue is whether the exercise of power in this area by the distribution statute comports with the safeguards of the Due Process Clause. For we are convinced that the congressional power to abrogate treaties is circumscribed by the limitations in other parts of the Constitution. See United States v. Klamath Indians, supra, 304 U.S. at 123; see also United States v. Tillamooks, 329 U.S. 40, 54; McCurdy v. Steele, 353 F.Supp. 629, 637 & n.12 (D.Utah), rev'd on other grounds, 506 F.2d 653 (10th Cir.).

Moreover, we feel that the dispute between the parties over whether any "vested rights" were conferred on the Kansas Delawares by the treaties need not be resolved to dispose of this argument concerning the power to amend treaties. The plaintiffs' constitutional claim under the Due

Process Clause and equal protection principles need not be grounded on a "vested right." See Shapiro v. Thompson, 394 U.S. 618, 627, n.6; see also Goldberg v. Kelly, 397 U.S. 254, 262 & n.8. Regardless of whether the Government was obligated to grant relief for the historic wrong to the Delawares, the relief having been undertaken and the award and appropriation having been made, we feel that the statute drawing classifications is nevertheless subject to due process and equal protection limitations. See *id.*; Griffin v. Illinois, 351 U.S. 12, 18. For even if they have no "vested" or contractual right, the Indian claimants may not be discriminated against by invidious classifications or by classifications having no rational relation to a legitimate legislative goal. See Weinberger v. Salfi, —— U.S. ——, (slip opinion at 20).

Finally, defendants urge that reference to the 1906 and 1940 rolls of the Cherokee and Absentee Delawares, respectively, represents a rational congressional decision to distribute the award to modern day tribal entities and their members, rather than to lineal descendants of the injured tribe as constituted in 1854. Defendants also contend that reference to the described rolls represents a congressional exercise of recognized power to define tribal membership for purposes of the distribution. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 100, 104, 105, 113.[40] We are unable

[40] In actuality, modern tribal membership of one of the benefited groups, the Absentee Delawares, is not followed in the statutory distribution under 25 USCA § 1292(c)(2). *E.g.*, a person born after July 30, 1957, must have ⅛ Delaware blood in order to be recognized as a member of the Absentee Delaware Tribe. See Defendant Absentee Delawares' Ex. 9 and 28. However, for distribution under § 1292(c)(2) such person need only show that his lineal ancestor's name is on or eligible to be on the constructed base census roll of the Absentees as of 1940, in which case he may thus participate in the distribution though he has less than ⅛ Delaware blood.

to accept these propositions as a rational justification for the exclusion.

We start from the point that the Indian Claims Commission Act and its underlying policies are neutral, not favoring any particular pattern of distribution of the Commission's awards. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52 (1971). Nevertheless, it must be remembered that the claim is that of the injured ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Bank of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). While in the absence of some provision to the contrary, the right of individual Indians to share in tribal property generally depends on tribal membership, see Halbert v. United States, 283 U.S. 753, 762-63; United States v. Jim, 409 U.S. 80, 82, we are convinced that distribution of awards under the Act for historic wrongs is not controlled by technical rules of ownership, descent and distribution. Distribution is for congressional disposition, consistent with constitutional limitations applied in light of the purposes of the Indian Claims Commission Act, the treaties and the relief of the award affords for injury to the ancestral tribe.

In this instance the claim of the Kansas Delawares to participation in the award has the foundation of their descendancy from the tribe injured at the time of the historic wrong. The wrongful sales of the tribe's lands in 1856 and 1857 diminished the amount of the resulting fund which had been established for the benefit of the Delaware "people" by Article 7 of the 1854 treaty with the tribe, 10 Stat. 1048, 1050, as the treaty repeatedly makes clear. And further, the Kansas Delawares' position is re-enforced by Article IX of the 1866 treaty with the tribe, 14 Stat. 793, 796, recognizing the Kansas Delawares' right, *inter alia*, on electing to take United States citizenship, to their "just proportion" of the tribal credits then held in trust by the

United States—credits that would have included the proper measure of payment from sales of the trust lands, but for the wrong to the tribe.

The award in question was made to redress that historic wrong to the entire Delaware Tribe under the 1854 treaty, and the Cherokee and Absentee Delawares were representing "the entire Delaware Tribe in its claim against the United States." See Findings of Fact 1, 23 and 24, Dockets Nos. 72 and 298, 21 Ind. Cl. Comm. 344; opinion in said dockets, 21 Ind. Cl. Comm. at 345, 347. The Kansas Delawares are descendants of the injured ancestral tribe and some 300 of them recently shared in the award under the Act in Docket No. 337 for the similar historic wrong of 1818.

In view of the redress which was the goal of the statute and the award, and in view of the Kansas Delawares' standing being equal in the context of that goal to that of the Absentee and Cherokee Delaware groups benefitted, Jimenez v. Weinberger, 417 U.S. 628, 637; United States Department of Agriculture v. Moreno, 413 U.S. 528, 537, we cannot sustain the unequal classification and the arbitrary exclusion it makes. Against the history, the statutes and the treaties involved, the designation of the two "modern groups" for exclusive distribution of the award is a discrimination reflecting no policy, but simply arbitrary and capricious action. Baker v. Carr, *supra*, 369 U.S. at 226.

We doubt that the Congress actually intended or realized that exclusion of a group such as the Kansas Delawares would result. But in any event, the resulting unequal treatment rests on no foundation rationally related to a legitimate governmental interest serving the purposes of the Act. Jimenez v. Weinberger, 417 U.S. 628, 636-38; see Weinberger v. Salfi, —— U.S. ——, —— (slip opinion, 17); United States Department of Agriculture v. Moreno, 413 U.S. 528, 533; Weber v. Aetna Casualty & Surety Co.,

406 U.S. 164, 172-73; Richardson v. Belcher, 404 U.S. 78, 81-84.

Giving the statutory classification the presumption of constitutionality as we must, and considering all justifications for the classification, we nevertheless must hold that the resulting exclusion of the Kansas Delawares violates the fundamentals of due process and equal protection.

IV

Validity of the Challenged Inclusions of the Cherokee Delawares and the Absentee Delawares in Distribution of the Awards

Plaintiff Kansas Delawares further argue that the Cherokee Delawares are not entitled to participate in the awards in either Docket No. 337 or Dockets Nos. 72 and 298, and that the statutes providing for distribution of both awards, 25 USCA §§ 1181-86 and 1291-92, violate their Fifth Amendment rights insofar as they include the Cherokee Delawares in the provisions for distribution of both awards. Plaintiffs also claim that the Absentee Delawares are not entitled to share in the award in Dockets Nos. 72 and 298, relating to the 1854 wrong. They say that the distribution statute for that award, 25 USCA §§ 1291-97, violates their Fifth Amendment rights insofar as it includes the Absentee Delawares.[41]

We disagree with these positions taken by the Kansas Delawares and conclude that the challenged distribution provisions are valid insofar as they included the Cherokee and Absentee Delaware.[42]

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[41] Plaintiffs do not challenge the right of the Absentee Delawares to share in the award in Docket No. 337, redressing the breach of the 1818 Treaty. See Plaintiffs' Proposed Finding of Fact No. 31; Brief of Plaintiff in Support of Motion for Summary Judgment at 80; Plaintiffs' Reply Brief on Constitutional Issues at 2.

[42] We realize that as a result of our conclusion in Part III that

The Inclusion of the Cherokee Delawares

Plaintiffs first claim that the Cherokee Delawares are Cherokee Indians by blood and hence have no right to share in awards to the Delaware Tribe. They argue that the Delawares who removed to the Indian Territory as contemplated by the Treaty of 1866, 14 Stat. 793, (*i.e.*, the "registered Delawares") became incorporated into the Cherokee Nation under the 1867 Articles of Agreement between the Cherokees and Delawares (Pl. Ex. 10, Tab I).[43] The Kansas Delawares contend that the effect of the 1867 Agreement was to abolish the Delaware Tribe as a political entity, with the registered Delawares individually becoming citizens of the Cherokee Nation and the children of these registered Delawares thereafter born becoming native blood Cherokees, citing Cherokee Nation v. Journeycake, 155 U.S. 196, and Delaware Indians v. Cherokee Nation, 193 U.S. 127, *inter alia*.

Plaintiffs conclude that the Cherokee Delaware class, being composed of present living descendants of children of registered Delaware born after the 1867 agreement, is

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the classifications made are invalid, and our conclusion in Part V that we must hold 25 USCA §§ 1291-97 invalid as a whole, our consideration of plaintiffs' additional challenges to the statute may be viewed as unnecessary. However, because of the desirability of a prompt decision on all of these constitutional issues, and of economy in efforts, we feel we should decide all these claims on their merits.

[43] The Agreement between the Delawares and the Cherokees provided in part as follows:

> On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as Native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

not a class of persons who are descendants of members of the Delaware Nation as it existed in 1818 or 1854, in terms of Indian tribal ancestry, citing Halbert v. United States, 283 U.S. 753. They argue that the Cherokee Delawares are native blood Cherokee citizens who never acquired any interest in the Delaware tribal claims for the 1818 or 1854 wrongs, and that they are not entitled under any constitutionally permissible rationale, to participate in the awards for either the 1818 or 1854 wrongs to the Delaware Tribe. They challenge the provisions for distribution of the awards to the Cherokee Delawares as invidious discrimination against those entitled to share in the awards, and claim deprivation of property without just compensation in violation of the Fifth Amendment.

We cannot agree that constitutional limitations prohibit distribution of an Indian Claims Commission award to all lineal descendants of the injured tribe. As stated, the claim to redress under the Act is that of the ancestral tribe and present day groups are before the Commission only on behalf of the ancestral entity. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 954 (Ct. Cl. 1974). The function of Congress is to decide the composition of the injured tribe at the time of the wrong. Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 52 (1971). We are convinced that a legislative decision to distribute an award to the lineal descendants of the injured tribe at the time of the wrong, regardless of their current tribal membership status, is well supported, considering the redress which is the goal of the Indian Claims Commission Act.

One ground for plaintiffs' argument is that the award should be treated as tribal property and governed by principles of communal ownership, applied in light of tribal history subsequent to the wrong.[44] We have already

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[44] Essentially, plaintiffs' argument is this: The move to the Cherokee Nation did not abolish the Delaware national fund (which

concluded that distribution of awards under the Act, which is for congressional decision, is not controlled by technical property concepts. We are satisfied that the Congress has sound ground for deciding to distribute an award to lineal descendants of the tribe injured by the wrong. See Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 46-52. And as discussed in Part V, *infra*, we conclude that there are no "vested rights" related to the awards in question which must be observed in the distribution.

Plaintiff Kansas Delawares argue further that all Cherokee Delawares who, pursuant to 25 USCA §§ 991-98, par-

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was diminished as recognized by the awards in Docket No. 337 and Nos. 72 and 298). After the 1867 move, the registered Delawares in Oklahoma and the Kansas Delawares were owners of the national fund, and, since this ownership was communal in nature, it could not be devised, transferred or inherited. On the death of the registered Delawares, their ownership interest terminated. The children of the registered Delawares, not being of Delaware blood, but of Cherokee blood, did not inherit from their Delaware Indian parents any interest in the Delaware national fund or in any claims which the prior existing Delaware tribe owned for breaches of treaties by the United States. The succeeding generations of descendants of the registered Delawares are also Cherokees, since they must claim through parents who were native Cherokees, the rule being that children belong to the tribe of their parents, not of their grandparents. Halbert v. United States, 283 U.S. 753 (1931). Plaintiffs conclude that the Cherokee Delawares, as Cherokees, have not succeeded to any rights of the prior existing Delaware tribe, and may not share in the national fund or in the claims which have matured into the awards in Docket No. 337 or Dockets Nos. 72 and 298.

We have rejected similar arguments that the distribution of awards, which is for congressional decision, is controlled by technical property concepts. Likewise, such contentions on the legal status of Cherokee Delawares and their rights under laws of descent are not dispositive of the constitutional claims. In any event, we are satisfied that despite the policy arguments against the Cherokee Delawares sharing in both Cherokee and Delaware awards, there was a sufficient nexus between the Cherokee Delawares and the injured ancestral tribe by descendancy for Congress rationally to include the Cherokee Delawares in the distribution of the awards redressing the 1818 and 1854 wrongs.

ticipated in the award in Indian Claims Commission Docket No. 173 of some $14,000,000 to the Cherokee Tribe, are barred by 25 C.F.R. § 101.4 from participating in the awards in question here. The regulation provides in pertinent part that:

> An Indian holding equal rights in two or more tribes can share in payments to only one of them and will be required to elect with which tribe he wishes to be enrolled and to relinquish in writing his claims to payments to the other.

More broadly, plaintiffs maintain that this rule against dual eligibility for tribal benefits is a long standing public policy. See Mandler v. United States, 52 F.2d 713, 714 (10th Cir.); F. Cohen, Handbook of Federal Indian Law, 137 (orig. ed. 1942). In view of these principles the Kansas Delawares assert there is no rational basis for the congressional decision permitting the Cherokee Delawares to share in the award to redress the Delaware wrongs of 1818 and 1854.

We must disagree. By its own terms 25 C.F.R. § 101.4 applies in circumstances where an Indian holds equal rights in two or more tribes and prevents sharing in payments made to two tribes. Even if controlling over the distribution statutes, the policy and regulation may be viewed as inapplicable on the theory that Indians, like the Cherokee Delawares, participating in the awards here are not receiving payments of two tribes, but that the participation in these awards brings compensation based on earlier circumstances when their ancestors were members of another injured tribe—or at least the Congress could rationally so conclude.

But in any event the policy and the regulation may be changed by statute, subject to constitutional limitations which we feel do apply to an exercise of congressional power over Indian legislation. We see no violation of

constitutional limitations arising from a change in policy concerning sharing in two tribal benefits.

The Inclusion of the Absentee Delawares

The plaintiff Kansas Delawares further argue that the Absentee Delawares may not be validly included in distribution of the award in Dockets Nos. 72 and 298 redressing the 1854 wrong. They say that the Absentees' ancestors were not with the main body of the Delaware tribe at the time of the 1854 wrong and were not harmed by breach of the 1854 Treaty.[45] Essentially they contend that entitlement to the benefit of a treaty or to compensation for its breach depends on residency with the tribal entity at the time of entering into the treaty and at the time of the wrong, respectively, and on being subject to the obligations of tribal membership, citing Eastern Band of Cherokee Indians v. United States, 117 U.S. 288; McGhee v. Creek Nation, 122 Ct. Cl. 380, cert. denied, 344 U.S. 856; Prairie Band of Potawatomi Indians v. United States, 165 F.Supp. 139 (Ct. Cl. 1958); and Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960). And the Kansas Delawares conclude that the unjustified inclusion of the Absentees in distribution of the award dilutes the interest of those rightfully entitled to such funds and constitutes a taking of their property without just compensation.

We are unpersuaded by the arguments. It is true that Indians who sever their tribal relationship and separate

[45] Although plaintiffs do not concede that the Absentee Delawares were members of the scattered Delaware Nation in 1854, they contend that even if they were, they were not in Kansas with the main body of the tribe which made the 1854 Treaty and were not residing on the lands which were ceded by the treaty. It is further claimed that those Absentees who did rejoin the main body of the tribe in Kansas prior to 1854 are ancestors of present members of either the Cherokee Delaware class or the Kansas Delaware class.

from the tribe lose their right to participate in tribal assets. Miami Tribe of Oklahoma v. United States, 281 F.2d 202, 213 (Ct. Cl. 1960). However, an Indian group absent from a main tribal body at the time of a wrong may still be recognized by the tribe as retaining tribal membership, and may have a claim to participate in an award redressing a wrong to the tribe. Delaware Tribe of Indians v. United States; 128 F.Supp. 391,399 (Ct.Cl.1955). Hence it is relevant to consider what the policy of the Delaware Tribe was in 1854 with respect to recognizing a continued relationship with the Absentees.

We feel the historical materials before us are not conclusive as to whether the Absentees were considered by the tribe to have retained their membership at the time of the breach of the 1854 Treaty. The Kansas Delawares rely on historical documents allegedly showing that, as a result of absenting themselves from the main tribal body in Kansas, the Absentees had, by tribal law, ceased to participate in the tribal councils and to have any interest in tribal property.[46] Defendants, on the other hand, point to

[46] Plaintiffs cite Pl. Ex. 32 (Letter from John G. Pratt, U.S. Indian Agent, to Thomas Murphy, Supt. of Indian Affairs, July 14, 1868) in support of this proposition. They further allege that the Absentees received no portion of the annuities paid to the main body of the tribe and did not participate in any of the treaty benefits accruing to the main body of the tribe, citing Pl. Ex. 32, *supra;* Pl. Ex. 145-B (Letter from John G. Pratt to Thomas Murphy, Nov. 27, 1866); Pl. Ex. 64 (Letter from A. H. McKisick, Wichita Agent, to Elias Rector, Supt. of Indian Affairs, Oct. 21, 1857, excerpt from Report of the Comm'r of Indian Affairs, 1857); Pl. Ex. 149 (Excerpt from "Registry, Allotment, Valuation, etc., Delaware Diminished Reserve, Treaty, July 4, 1866"). In particular, they argue that the Delaware national fund, into which the proceeds from the sale of the lands under the 1854 Treaty were placed, was paid out per capita to members of the Delaware nation by 1893 and that the Absentees never received any part of such fund.

There was an objection as to authentication of plaintiffs' exhibit 32, cited above, which appears to be good. Nevertheless, even

several treaty provisions and authoritative discussions of Delaware history indicating that the Absentees were recognized as members of the tribe by its main body in 1854. See Article IV of the 1860 Treaty between the United States and the Delaware Tribe, 12 Stat. 1129, 1130-31; S. Rep. No. 1518, 90th Cong., 2d Sess. 7-11 (1968).[47] More-

considering the exhibit, our conclusion remains the same in rejecting plaintiffs' arguments in view of the treaty provisions and other documents cited which serve as an adequate and rational basis for the decision of Congress to include the Absentees in the distribution of the award.

[47] The defendants say the Treaty of May 30, 1860 between the United States and the Delaware Tribe, 12 Stat. 1129, is evidence of such a contemporaneous understanding as to the structure of the Delaware tribe. Article I of that treaty referred back to Article 11 of the 1854 Treaty, 10 Stat. 1048, 1050, which had provided for the possible future survey and individual assignment of the residence lands left to the Delawares under the 1854 Treaty. Article I went on to provide that those lands should now be surveyed "and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres. . . ." Article IV of the 1860 Treaty, 12 Stat. 1129, 1130-31, went on to make provision for the Absentee Delawares in the following terms:

> Whereas some years ago a good many of the Delawares went down among the Southern Indians, and as there are still about two hundred of them there, and as they have reason to believe they will return soon, it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations as prescribed for the government of the lands reserved by the preceding articles, that until they return the allotments set apart for belong (sic) to the nation in common.

Defendants contend that, by this 1860 Treaty, the ancestors of the Absentee Delaware class were recognized as members of the Delaware Tribe with rights co-extensive with all other tribal members. They allege that these rights included full rights to tribal land, annuities, trust funds and interest accruing to the Delawares under former treaties, including the 1854 Treaty.

However, plaintiffs assert that Article IV of the 1860 Treaty

over, we note that the Court of Claims found from its examination of the tribal history that "the rule and policy of the Delawares [in 1854] was and had been to recognize all Delawares everywhere, who had maintained their identity as Delawares, as members of the tribe." Delaware Tribe of Indians v. United States, *supra*, 128 F.Supp. at 399.

We feel this view is persuasive, and that the Congress also was entitled to consider it in drawing the distribution statutes, along with the other historical evidence. Thus, although the historical materials are not conclusive, there is support for the position that the Delaware tribe in 1854 recognized the Absentees as members of the tribe. In these circumstances we cannot say the Congress had no rational basis for the inclusion of the Absentees in the provisions for distribution for the award to redress the 1854 wrong.

V

Equitable Jurisdiction and Remedies

Having concluded that the classifications made in 25 USCA §§ 1291-97 for distribution of the award redressing the 1854 wrong, resulting in the exclusion of the Kansas Delawares, are invalid, it remains to consider the proper

was not an offer to allow the Absentees to share in the *Delaware national fund* if they returned, but only an offer of an *eighty acre allotment* to each Absentee if they returned. In any event, plaintiffs urge that the Absentees did not, in fact, return in response to the opportunity offered by the treaty, thus refusing to rejoin the tribe and forfeiting their right to receive land in Kansas. Plaintiffs cite Pl. Exs. 32 and 145-B in support of this contention. Further, plaintiffs argue that the 1860 Treaty is irrelevant because, under the controlling cases, merely being recognized as a part of the tribe or Nation is not sufficient grounds to establish the Absentees' claim to share in proceeds relating to the breach of the 1854 Treaty, citing Prairie Band of Potawatomi Indians v. United States, *supra*, 165 F.Supp. 139; and Miami Tribe of Oklahoma v. United States, *supra*, 281 F.2d 202.

remedies and to determine whether other portions of the distribution statute may be upheld and continued in effect. These questions lead us to the remaining disputes between the parties.

First, defendants argue that if plaintiffs' allegations of a taking of their property without just compensation and without due process are true, they may be entitled to recover money from the Treasury and must present their complaint in such a suit in the Court of Claims or in the district courts. They point to 28 USCA § 1505 conferring jurisdiction on the Court of Claims to hear Indian claims against the United States; to the Tucker Act, 28 USCA § 1491, granting that court jurisdiction of claims against the United States founded on the Constitution, among other things; and to jurisdiction conferred on the district courts by 28 USCA § 1346 to hear such claims for amounts not exceeding $10,000. Defendants argue that the only constitutional question presented is whether the challenged statutes have deprived plaintiffs of their resort to those forums; that there is no such foreclosure of remedies to recover by actions at law there; and that injunctive relief and invalidation of the statute would therefore be improper, citing Regional Rail Reorganization Act Cases, 419 U.S. 102; United States v. Causby, 328 U.S. 256; and Hurley v. Kincaid, 285 U.S. 95. See Defendants' Consolidated Proposed Findings of Fact and Conclusions of Law, at pp. 71-75.[48]

We feel that reliance on Regional Rail Reorganization Act Cases, *supra,* is misplaced. The case involved admit-

[48] Defendants argue that plaintiffs could maintain a class action in the Court of Claims under procedures analogous to those under Rule 23 F.R.Civ.P. See Quinault Allottee Association v. United States, 453 F.2d 1272 (Ct. Cl.). Thus they say no multiplicity of suits and no other like inequitable result would occur by litigation in that forum, or in a district court suit under 28 USCA

tedly existing property rights of the rail companies, their owners and claimants against the bankrupt estates. The Court defined the major issues as being whether an action at law under the Tucker Act will be available to recover any deficiency of constitutional dimension in compensation for the takings allegedly to be effected by the Act, and if the Tucker Act remedy is available, whether it is adequate. 419 U.S. at 121. The Court held that the Tucker Act remedies were not withdrawn, and that they were adequate to recover compensation for any "constitutional shortfall" resulting from conveyances required and, therefore, that the Regional Rail Reorganization Act was not an unconstitutional reorganization plan. *Id.* at 154-55.

However, the case involved no question of the existence of obvious property rights or vested rights of the various parties, *id.* at 122, 137, and the Tucker Act remedy was held available for monetary recovery for any inadequacy in compensation under the Act's reorganization procedures. On the contrary, we feel that here the plaintiffs have no property or vested right in the Indian Claims Commission award in question and, hence, no remedy to recover specific monetary compensation on behalf of any plaintiff or the class of Kansas Delawares. As explained earlier, while we uphold the plaintiffs' claim under the Due Process Clause and equal protection principles incorporated by it, that constitutional claim grounded on irrational classifications is available without the premise of property or vested rights in the award.[49] We do not feel that plaintiffs have any such property or vested rights in the award as may

[49] Defendants argue that the Court of Claims does give plenary consideration to claims of arbitrary and invidious discrimination, relying on Frederick v. United States, 507 F.2d 1264, 1266, (Ct. Cl.), saying that all claims of plaintiffs must be put before the Court of Claims. Again, however, the *Frederick* case involved a claim of statutory right to employment and monetary recovery which distinguishes it from our case where no such rights in the award exist.

premise a constitutional claim entitling them to specific monetary recovery under the Tucker Act. As pointed out below, after the award is entered Congress subsequently determines the beneficiaries of the award and there may not be a constitutional claim for monetary recovery with respect to the award as entered. Cf. United States v. Jim, 409 U.S. 80, 83.

For like reasons United States v. Causby, 328 U.S. 256, and Hurley v. Kincaid, 285 U.S. 95 are not in point, since they also involved admittedly existing property rights whose taking was compensable by recoveries against the United States.

Since we conclude that the plaintiffs here have no property or vested rights in the award, we feel that they have no remedy at law for specific monetary recovery under the Tucker Act, although they do have a good claim for protection against the irrational statutory classification and exclusion. We are persuaded we should consider and uphold that constitutional claim on its merits and grant equitable and declaratory relief, there being no full and adequate remedy at law and no reason to avoid a prompt decision. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585; see Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 780.

Our conclusion that the plaintiffs here have no vested or property rights in the award, as they claim, is based on the special procedures of the Indian Claims Commission, discussed earlier. Under those procedures the Commission's awards determine only the identification of the injured tribal entity, making plain the time of the wrong and the injured group, and do not pre-determine the persons who will share the award; later the Congress determines the composition of the injured tribal entity and the beneficiaries of the award. See Cherokee Freedman v. United States, 195 Ct. Cl. 39, 48, 51-52. In addition, the Congress decides on procedures for the subsequent distribution and

whether portions of the fund should be held in trust for the Indians' benefit. *E.g.*, 25 USCA §§ 1293 and 1294. In light of these undecided points remaining for congressional decision after entry of the Commission's awards, it seems clear that no individual or class property right attaches or vests in the Commission's award as entered, such rights depending on later congressional determination.

Finally, we must determine the proper disposition to make in view of our conclusions concerning the validity of the distribution statutes. Of course, since the Act distributing the award redressing the 1818 wrong is being upheld, the interlocutory restraint affecting the remaining portion of that award should be vacated, and we will grant a declaratory judgment of the validity of 25 USCA §§ 1181-86 and deny all other relief sought in connection with the award in Docket No. 337 which that statute distributes.

We have concluded that the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97, contains irrational classifications, resulting in an invalid underinclusion. Jimenez v. Weinberger, 417 U.S. 628, 637. In such circumstances there are two general alternatives: the court may declare the statute invalid as a whole, or it may extend its coverage to include those aggrieved by the exclusion. See Welsh v. United States, 398 U.S. 333, 361 (Harlan, J. concurring); Moritz v. Commissioner of Internal Revenue, 469 F.2d 466, 470 (10th Cir.), cert. denied, 412 U.S. 906. While in some cases involving a deeply imbedded policy there are compelling reasons to make the "necessary statutory repairs," Welsh v. United States, *supra*, 398 U.S. at 366, extending the coverage of the statute and saving its validity, we feel that we may not do so here.

There is no separability clause in the statute. The absence of such a clause may not foreclose the exercise of discretion to the end that the legislative provisions may be repaired and saved. *Id.* at 366. Here the difficulty with repair is that the remainder of the statute does not contain

general provisions easily adaptable to an extension of the statute's coverage. See Moritz v. Commissioner of Internal Revenue, *supra*, 469 F.2d at 470. Moreover, even if repairs by an extension of coverage were possible, we cannot confidently say that Congress would have intended the continued operation of the remaining parts of the statute—such as the provision for withholding 10 percent of the awards in trust—if it had known that the statute would have to be subjected to an extension of its distributive provisions to include the Kansas Delawares.

In view of these difficulties and the absence of a separability clause, we conclude we should follow the general presumption that is observed where a separability clause is not provided, and hold the statute invalid as a whole. See Carter v. Carter Coal Co., 298 U.S. 238, 312. This disposition will permit further congressional consideration of a desired distribution enactment as a whole, free of the invalid exclusion.

In sum, we conclude that we should adjudge the statute distributing the award redressing the 1818 wrong, 25 USCA §§ 1181-86, valid in all respects. The preliminary restraint against distribution of the remainder of that award will be vacated, and all relief sought by the plaintiffs with respect to that award will be denied. With respect to the statute distributing the award redressing the 1854 wrong, 25 USCA §§ 1291-97, we are entering our decree declaring that the provisions including the Cherokee Delawares and the Absentee Delawares in the distributive scheme are valid, but that the classifications drawn and the resulting exclusion of the Kansas Delawares render this distribution statute invalid as a whole, and we restrain distribution by the Secretary under that statute.

We find and conclude that there is a case of actual controversy within the jurisdiction of the court, appropriate for entry of a declaratory judgment determining the rights and legal relations of the parties and classes involved. The

funds appropriated to satisfy the award in Indian Claims Commission Dockets Nos. 72 and 298, and the increments of interest thereon, are under the control of the Defendant Secretary and his agents and employees, and are required to be distributed and credited pursuant to the distribution statute which we hold invalid. Unless equitable relief is granted, such distribution and crediting will occur and irreparable harm to the plaintiffs and the plaintiff Kansas Delaware class will result. Therefore declaratory and equitable relief should be granted in connection with said award, as provided in our judgment.

Since our earlier orders were entered denying motions; and the filing of answers to the complaints, several additional motions have been filed by the parties for additional relief. We conclude that these motions should all be denied for lack of merit or because our conclusions and our decree render all necessary and proper relief.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

Appendix

A

In the transcript of the hearing before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, the following remarks appear between Mr. Pruner, a member of the Tribal Council for the Absentee Delaware Tribe; Congressman Edmondson of the Subcommittee, who presided; and Mr. Townsend of the Delaware Business Committee for the Cherokee Delawares, (House Subcomm. Hearings *supra* n. 27, at 78-80):

> Mr. Pruner. To clarify that one point further, Myrtle Holder and Exendine are members of our tribe—
>
> Mr. Edmondson. They did not sue in that capacity, they sued in the capacity as class litigants for the Delaware Nation.
>
> Mr. Pruner. Yes.
>
> Mr. Edmondson. I can understand Counsel's reason for having drafted it that way, because he wanted a provision that would cover the waterfront. And he got it covered with the judgment. *Of course we have the task of defining just who the Delaware Nation in 1854 included, in addition to what you have before us here today as Plaintiffs representing the two Oklahoma groups.* And I for one am certainly ready and willing to exclude anybody who is a member of the Delaware Nation of 1854 who went elsewhere and participated in a judgment as a member of another tribe. *But I have some difficulty about a person who is a descendant of that Delaware Nation of 1854 who went elsewhere and has not affiliated with another tribe and participated in a judgment with another tribe.* It poses a problem for me as a very biased Oklahoman on the subject. And I think you will probably have more trouble with non-Oklahomans than you do with Oklahomans.

> Mr. Rochmes. *Mr. Chairman, we do not think there are any such. We know the Bureau maintains there are. We think that all people either are on those rolls or are eligible for the rolls at the very times at which the rolls were made.*
>
> Mr. Edmondson. If you do not think there are any you would have no objection to our including as an eligible person who can prove he is a lineal descendant of someone who was a member of the Delaware Nation in 1854, and who had not participated in any other tribal judgment?
>
> Mr. Rochmes. I think you would have to draft tougher standards than that, because the Bureau people have already make it known to us that they intend to include people who we think clearly are not Delawares and were not part of the Delaware Nation as as of that time.
>
> Mr. Edmondson. Then they would have to prove that they are descendants of Delawares.
>
> Mr. Rochmes. Yes. But the Bureau is already saved [sic] with the proof, as for example, that the Christian Munsees were Delawares as of this time. And we think the evidence which saves [sic] them would not save [sic]a court and would not save [sic] you, perhaps. (emphasis added)

B

Defendants point to several statements in the legislative history which they rely on as showing that Congress was aware that it might be eliminating some lineal descendants of the 1854 Delaware Nation in enacting the narrower provisions of 25 USCA § 1292. The first is contained in the Statement of Louis L. Rochmes, tribal attorney for the Cherokee Delawares group, (attached to the House Subcomm. Hearings, *supra* n. 27 at 45 ff).

That Statement reads, in part, as follows:

This statement is submitted in support of the [Cherokee and Absentee Delaware] tribes' position on H.R. 5200.

In substance that position is that the bill should provide for the division of the funds between the two tribes, to the exclusion of non-Delawares.

Discretion to effect another division has been requested by the Bureau of Indian Affairs. . . The Bureau proposes to conduct a search among the Stockbridge-Munsee Community of Wisconsin for those descendants of the "Emigrant New York Indians" who, it is asserted, "were Delawares who had previously absented themselves from the main body of the tribe" *and also to search for others who, it is hypothesized, "may also be descendants of members of the Delaware Nation in 1854"*. These are suppositions not based on fact. I was associated with counsel for the plaintiffs in the Emigrant New York Indian case, and am familiar with the evidence adduced in that case. . . . There was no evidence of Delawares among the Emigrant New York Indians. . . .

Even if these suppositions were based on fact, they would not justify the Bureau's position. The Indian Claims Commission Act is intended expressly for the benefit of existing Indian tribes, bands and other identifiable groups, and a search for individual descendants who may have elected to change their tribal affiliation is unwarranted. . . .

• • •

The Delaware tribes are particularly concerned with an opinion expressed by Bureau representatives. . . . This is the opinion that a group of Munsee Indians living in Kansas, sometimes known as the Christian Indians, sometimes as the Christian Munsees, and

more recently as the Chippewa Munsees, are entitled to be regarded as Delaware for the purpose of sharing in Delaware judgment funds, and particularly in Dockets 72 and 298. (emphasis added)

Defendants point to the mention of "others" who may also be descendants of members of the Delaware Nation in 1854. However, Mr. Rochmes states thereafter that the supposition that there are any "other" such descendants "is not based on fact." The statement as a whole focuses on the question of the possible inclusion of various Munsee Indians in Dockets Nos. 72 and 298, while making no reference to the Kansas Delawares or any group of lineal descendants of true members of the Delaware Nation in 1854 who might be excluded from the judgment by deletion of the "lineal descendants" provision. Mr. Rochmes' testified later before the House Subcommittee on Indian Affffairs, to which this statement was made, that all true descendants of the Delaware Nation of 1854 who had not affiliated with another tribe or participated in a judgment to another tribe would be covered by the distribution provision proposed by the Cherokee and Absentee Delawares. See Part A of this Appendix.

A second statement to which defendants refer is contained in a letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to Caspar W. Weinberger, Director, Office of Management and Budget, dated September 28, 1972, which states the views of the Department of the Interior on H.R. 14267. That letter discusses the differences between H.R. 14267 and H.R. 5200 and, in regard to H.R. 14267's reliance solely upon the 1906 and 1940 rolls, states: "Although, unfortunately, they [the two rolls] do not include a few Delaware descendants who do not reside in Oklahoma, we consider them to be acceptable rolls." We note however, that this letter was written after H.R. 14267 had passed both houses of Congress to give the

Department of the Interior's recommendation as to whether the President should approve the bill.

Third, defendants point to a report written by the Department of the Interior which was included in the House Report accompanying H.R. 16402 (the bill for distribution of the award in Docket No. 377), wherein the Department stated (H.R. Rep. No. 1555, 92d Cong., 2d Sess. 3-4 (1968) (Defendants Secretary and Cherokee Delawares' Ex. 3)):

> There are also other individuals who are lineal descendants of members of the Delaware Nation as it was constituted in 1818, but who are not presently affiliated with either of the Oklahoma Delaware groups. Some we believe, are affiliated with the Stockbridge-Munsee Community in Wisconsin and *others are not affiliated with any tribal group under federal supervision*. In view of the amalgamation of the Delawares with other Indians and the many unique and complex problems encountered in identifying the ultimate beneficiaries of this award, a brief history of the Delaware Nation is enclosed. (emphasis added)

We cannot agree that this earlier, 1968 Departmental reference to "others" (i.e., other lineal descendants not affiliated with any tribal group) served as any notice to Congress of the existence of the Kansas Delawares, especially in view of the fact that the history the Department attached to its report dealt extensively with Munsee affiliations.

In its history the Department stated (*Id.* at 10):

> The *majority* of Delaware Indians who moved on to the Kansas reserve remained until 1867. By the terms of an April 8, 1867, agreement concluded between these Delawares in Kansas and the Cherokee in Oklahoma, the Delaware removed to Indian territory and reside today as Cherokee Delaware in northeastern Oklahoma. (emphasis added)

From this and other exhibits defendants request a finding that:

> Congress was aware, from 1968 forward, that the appropriation and distribution legislation which it enacted to pay the Final Awards of the Indian Claims Commission in *both* Indian Claims Commission Docket No. 337 and Indian Claims Commission Docket No 72 and 298, would not provide payment to every person who could claim to be, ethnologically, a 'Delaware'. The Department of Interior's Report to Congress, a part of the legislative history of House Report No. 1555, 90th Congress, 22d Sess., the Report which accompanied H.R. 16402, the Bill which evenually became Public Law 90-508 (25 U.S.C. 1181-86) (Sec. Of Int. and D.T.I.No.3) reflects that the Bill would provide for payment to the 'majority' of modern-day Delaware Indians.

Defendants' Proposed Findings of Fact and Conclusions of Law, p. 63 (as amended Oct. 3, 1975).

We are not persuaded that the 1968 or 1972 legislative history, or both combined, support such an inference or indicate any awareness that the 1972 statute (25 USCA §§ 1291-97) would exclude a group such as the Kansas Delawares who were lineal descendants of the 1854 Delaware tribe.

Defendants also cite the House Committee Report accompanying H.R. 14267, (the bill for distribution of the award in Dockets Nos. 722 and 298) and emphasize the statement therein that (H.R. Rep. No. 92-1081, 92d Cong., 2d Sess. 2 (1972) (Defendants Secretary and Cherokee Delawares' Ex. 6)):

> The recommendations of the Department [of the Interior] regarding the preparation of the updated roll [of those who had participated in the Docket No. 337 judgment] were not adopted by the committee because they were strenuously opposed by both of the Indian groups concerned, and *the Indian position is, in the opinion of the committee, a defensible one.* (emphasis added)

However, as stated above, it does not appear that the House Committee was aware that the "Indian position" it termed defensible would result in the exclusion of lineal descendants of persons who were members of the Delaware Tribe in Kansas in 1854.

Finally, defendants have pointed to the following colloquy between Senator Bellmon and Mr. John O. Crow, then Acting Commissioner of the Bureau of Indian Affairs, which occurred during the course of the Senate subcommittee hearings on distribution legislation for the award in Dockets Nos. 72 and 298, at which Senator Bellmon presided:

> Senator Bellmon. As you know, I am from Oklahoma and I am aware that both Delaware groups oppose S. 1067, but favor H.R. 14267, which was approved by the House. Can you give me your reasoning for favoring S. 1067 or H.R. 14267?
>
> • • •
>
> Senator Bellmon. Do you know the basis for the objections to S. 1067?
>
> Mr. Crow. I think the tribal delegates can tell you much better than I. However, I think that the primary difference, perhaps, is in the definition of persons excluded from sharing in the judgment.
>
> Senator Bellmon. Do you have any information as to how many would be excluded under H.R. 14267 that would have been included in S. 1067?

> Mr. Crow. *It is most difficult to say. We think the number would be quite small. We can't see any possibility of it being more than 200 people.*[50]

Hearings on S. 3113, S. 1067, S. 2249 and S. 2298 Before the Subcom. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 38-39 (July 21, 1972) (Pl. Ex. 5). Defendants assert that this colloquy demonstrates that both the Senate and the House were aware that the distribution statute would not include all possible Delaware claimants.

We note Senator Bellmon's question to Mr. Crow further in the same hearing. *Id.* at 40.

> Senator Bellmon. If the Congress were to take action which excluded the *non-Oklahoma Delawares* from sharing in this judgment, do you see any possible future legal implications for the federal government? (emphasis added)
>
> Mr. Crow. Mr. Chairman, I don't.

Subsequent testimony by tribal delegates in the same hearing makes it clear that the impression was that the persons that would have been included by S. 1067 (to which Mr. Crow made reference, *supra)* and the "non-Oklahoma Delawares" that were being considered for exclusion (to which Senator Bellmon made reference, *supra)* were the Munsee Indians:

> Mr. Townsend. Mr. Chairman, I am Bruce Miller Townsend, Chairman of the Delaware Tribal Business Committee. To my right is Mr. Lawrence Snake who is President of the Absentee Delaware Tribe of Western Oklahoma. . . .
>
> • • •

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[50] It will be recalled that S. 1067 would have updated the Docket No. 337 roll to include lineal descendants of the Delaware Nation as it existed in 1854. H.R. 14267 was essentially the bill enacted.

When S. 1067 was first introduced into the Senate of the United States, there were problems at that time that were latent and did not come to the fore until a later time. They didn't take very long. *Id.* at 42.

• • •

The crux of the matter is the difference between the departmental report, as Mr. Crow has stated, his inclusion of a foreign group of Indians in Delaware matters, that is the Munsee Tribe, and the various names by which it goes. *Id.* at 44.

• • •

Senator Bellmon. . . .

Only one further question. This is the tough one, I am sure, for all of you. But if Congress moves ahead to approve legislation along the lines of the House-passed bill, which would exclude *the non-Oklahoma Delawares, the Munsees,* from sharing in its present judgment, do you foresee any future legal implications for the federal government? (emphasis added)

Mr. Townsend. Mr. Chairman, I am an attorney at law and I don't know that this gives me any greater insight than anybody who is not an attorney, but my way of knowledge—if there has been any legal problem that could face the Bureau of Indian Affairs, it would be a puppy that they brought home and has grown into a ferocious beast by now.

I say this by reason of the fact that any problems that could be brought out in the way of litigation has been fostered, promulgated, by the unilateral action of the Bureau. I can see none, but there have been these 1,552 applications filed. The Bureau beat the bushes to get them filed and, as far as whether or not any of those people would be interested in instituting litigation, I would say that based upon their track record the chances are nil.

I say that because of the fact that they did not respond to my brief in 1966. They did not respond any further than discussing the matter with their counsel subsequent to that time. No one was present at the House of Representatives Subcommittee on Indian Affairs hearing in 1968. No member of the Munsee Tribe was present at the House Subcommittee hearing last November which was passed over into this March. No members of the Munsee Tribe, nor did they have representatives at those meetings or the March meeting before the House.

Of course, anyone can go to a lawyer, draw up a paper and call it a lawsuit, but I don't think this is what your question implies. I don't foresee the possibility of a meritorious lawsuit in this matter.

Senator Bellmon. Mr. Snake.

Mr. Snake. Mr. Chairman, I am of the same opinion. Since all of these claims have been in hearing, we have never to this date had any Munsee to testify. So I am of the same opinion that there would not be any lawsuit. *Id.* at 69-71.

C

Article IX of the 1866 Treaty (14 Stat. 793, 796) provides:

> Article IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all of said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a cer-

tified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court, that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of the said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be said to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests

herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide proper guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in the property or annuities.

The Act of 1874 (18 Stat. 146, 175) appropriated an amount for payment of interest on the Delaware general fund, then added:

> For this amount, to enable the Secretary of the Interior to pay to the children of the Delaware Indians who became citizens of the United States under the provisions of the ninth article of the Delaware treaty of July fourth, eighteen hundred and sixty-six, and the children of Betsey Zeigler, who died before completing her citizenship under the provisions of said article, their proportionate share of the money and stocks held in trust by the United States for the Delaware tribe of Indians, fifty-four thousand five hundred and fourteen dollars and twenty-three cents, of which twenty-one thousand four hundred and forty-eight dollars and seven cents shall be deducted from the money-credits of said tribe, and thirty-three thousand

and sixty-six dollars and sixteen cents, to be taken equitably from their several kinds of stock, shall be transferred to the Secretary of the Treasury and become the property of the United States: Provided, That if the Secretary of the Interior shall so determine, the whole amount hereby appropriated shall be taken from the money-credits of the tribe, the Secretary of the Interior to designate the funds from which said amounts shall be taken: Provided, That in the case of deceased persons, the Secretary of the Interior shall make payment to their legal representatives; and said Delaware children are hereby declared to be citizens of the United States, with all the rights, privileges, and immunities of such; and the Secretary of the Interior is hereby authorized and directed to cause patents to issue in fee-simple to said persons for the lands allotted to them; and in case of the decease of any of said persons, the said patents shall issue in the names of such deceased persons, including the said Betsey Zeigler, and the title to the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life; and the Secretary of the Interior shall cause patents to be issued in fee-simple in the names of Barbara Zeigler, Martha Zeigler, Samuel Ketchum, Nathan S. Tiblow, and Francis H. Grinter, who belonged to the families of the citizen class, and who died prior to the census of said Indians made by the agent under the provisions of the treaty of July fourth, eighteen hundred and sixty-six, for the lands allotted to them, and the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life.

DAUGHERTY, District Judge concurring part and dissenting in part:

I concur in part and dissent in part. I concur in that part of the majority opinion which results in upholding the distribution of funds ordered by the Congress in 25 U.S.C. § 1181-6 and rejecting Plaintiffs' attacks thereon. However, I must dissent to that part of the majority opinion which declares the distribution of funds ordered by the Congress in 25 U.S.C. § 1291-7 to be void and unconstitutional.

PLENARY POWER OF CONGRESS

I consider such distribution of funds to the Indian Tribes and members on their rolls as ordered by Congress in 25 U.S.C. § 1291-7 to be within the plenary power of Congress in relation to Indians and not justiciable. In *Lone Wolf* v. *Hitchcock,* 187 U.S. 550, 49 L. Ed. 299, 23 S.Ct. 216 (1903) it was held:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

This case has not been reversed and the decisions following it are too numerous to cite. However, as late as 1973 our Court of Appeals in *National Indian Youth Counc., Int. Ind. Sch. Chap.* v. *Bruce,* 485 F. 2d 97 (Tenth Cir. 1973) held:

> "District courts are also without jurisdiction when confronted with non-justiciable political questions, such as determining the status of Indian tribes. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962). Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. Lone Wolfe v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216,

47 L. Ed. 299 (1903). This court has recognized the plenary power of Congress to control and manage the affairs of its Indian wards. Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949), cert. denied 336 U.S. 968, 69 S.Ct. 941, 93 L.Ed. 1119 (1949); Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931)."

Also see *Groundhog* v. *Keeler,* 442 F. 2d 674 (Tenth Cir. 1971).

Congress did not have to create the Indians Claims Commission, 25 U.S.C. §§ 70 et seq., to allow Indians to present claims for redress for past Government wrongs. Nor was Congress required to appropriate and distribute funds regarding a final award recommended by the Commission. Congress by provisions in the Indian Claims Commission Act reserved unto itself the matter of determining the distribution to be made of appropriated funds in payment of awards recommended by the Commission. All of this is pursuant to the unique plenary authority of Congress over Indians. It is therefore my belief that the attacks made herein on the distributions of funds to Indians as ordered by the Acts of Congress involved herein are non-justiciable. I have not found a single case in which an Act of Congress relating to the affairs of Indians has been stricken down as being unconstitutional and void as the majority does herein.

Treaty Provisions

In addition, the Treaty itself, which is the foundation of Plaintiffs' alleged rights, gives full authority and discretion to Congress in the matter of the distribution of funds derived from the land sales when it provides in Article 8 in part as follows:

"* * * and *in distributing the funds to the (Delaware) people,* due regard and encouragement shall be given to that portion of the Delawares who are competent

to manage their own affairs, * * * but *Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may in the wisdom of that body,* seem just and proper." (Emphasis added)

Thus, Congress had treaty authority with the Delaware Nation (as well as plenary power) to use its wisdom in the distribution of the funds involved herein to the Delaware people.

Appropriated Funds

Furthermore, I am unable to discard the proposition urged by the Defendants that the Acts of Congress under attack are appropriations of public funds within the meaning of Article 1, Section 9, Clause 7, United States Constitution, and as such may not be redesignated by the Courts under the pronouncement of *United States* v. *Price,* 116 U.S. 43, 29 L.Ed. 541, 6 S.Ct. 235 (1885). This early case and those following it teach that no discretion is vested in the Secretary of the Treasury "or in any Court" to determine the correctness of either the amount or the designee of a payment ordered by an Act of Congress. Congress by 25 U.S.C. § 70u reserved unto itself exclusive power to distribute, or to decline to distribute, the appropriated funds necessary to pay any final award recommended by the Indian Claims Commission. The majority opinion has the effect of ordering a redesignation of the recipients of appropriated funds from those designated by the Congress.

Rationality

Also, there is the matter of whether there is rationality in the Acts passed by Congress which the majority strikes down. Ordinarily, determination and classification laws are

upheld if there is a rational basis for the same. *United States* v. *DePugh,* 266 F. Supp. 453 (W.D. Mo. 1967), aff'md. 393 F.2d 367 (Eighth Cir. 1968), cert. den. 393 U.S. 832.[1] At one point in this litigation I agreed (without abandoning my position regarding the plenary power of Congress, the provisions of the Treaty involved granting Congress full power regarding the distribution of funds pertaining to the sale of the Indian lands and that the funds here distributed by Congress are an appropriation of public funds) to hear evidence and arguments and receive Briefs on the rationality question. As I read the majority opinion it turns on an alleged lack of rationality or lack of a rational basis for the Congress to exclude the so-called Kansas Delawares from the distribution of funds ordered by 25 U.S.C. § 1291-7. I find in the record an abundance of rationality to support the distribution of funds made by Congress in these Acts and do so differently than in 25 U.S.C. § 1181-6.

The Indian Claims Commission is without authority to fix the distribution to be made of their recommended awards. See 25 U.S.C. 70r as to the contents of the final

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[1] This case provides:

"This Court is governed by the fundamental rule of statutory construction that a presumption of validity attaches to an Act of Congress, and that such presumption is not lightly overcome. See, United States v. National Dairy Corp., 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed. 561 (1963) rehearing denied 372 U.S. 961, 83 S.Ct. 1011, 10 L.Ed. 2d 13; McMahon v. City of Dubuque, Iowa, 255 F.2d 154, 160 (8th Cir. 1958) cert. den. 358 U.S. 833, 79 S.Ct. 53, 3 L.Ed. 2d 70. So long as a rationally sound basis exists for the congressional determination or classification, that determination is within the constitutional power of Congress. Egan v. United States, 137 F.2d 369, 375 (8th Cir. 1943), cert. den. 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474; Stutz v. Bureau of Narcotics, etc., 56 F. Supp. 810, 813 (N.D. Calif. 1944). It is a matter of legislative judgment. See, Kentucky Whip and Collar Co. v. Illinois Central Railroad Co., 299 U.S. 344, 57 S.Ct. 277, 81 L.Ed. 270 (1937)."

determination of the Commission. "How the award is to be paid and precisely who can participate • • • are questions for Congressional and administrative determination." *Snoqualmie Tribe of Indians* v. *United States,* 178 Ct.Cl. 570, 372 F. 2d 951 at page 957 (1967); *Peoria Tribe of Oklahoma* v. *United States,* 169 Ct.Cl. 1009 at page 1011-12 (1965). But the fact is that the Commission nevertheless recommended or at least suggested to whom their recommended awards in both CD 337 and CD 72 and CD 298 should be distributed. In CD 337 the Commission announced the idea of a distribution to individuals who could establish requisite Delaware blood entitlement and did so notwithstanding the obvious fact that the lands involved were tribal lands and not individual lands.[2] Congress adopted or followed this suggested distribution in its appropriation and distribution enactments and such problems, turmoil, confusion and delay ensued that these funds have not yet been fully distributed! In CD 72 and 298 the Commission recommended or suggested (and again the Congress followed the same) that the funds be distributed to the two recognized Tribes of Delaware Indians and members on their rolls which is what the Commission should have recommended or suggested and the Congress should have done in CD 337. It is believed fair to conclude that this change in attitude about distribution in both the Commission and the Congress came from the problems which resulted from the earlier distribution and the realization that it was wrong. This is a rational basis for the decision of the Congress exercised in enacting 25 U.S.C. § 1291-7. But there is more rationality.

The so-called Kansas Delawares on the one hand and the Cherokee (or Oklahoma) Delawares and the Absentee

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[2] Public lands and public funds of Indian Tribes are tribal properties and are not held in individual ownership. *Minnesota-Chippewa Tribe* v. *United States,* 161 Ct. Cl. 258, 315 F. 2d 906 (1963).

Delawares on the other hand over a hundred years ago came to a parting of the ways. The Delaware Indian Nation ceded their lands in Kansas, moved to Oklahoma from Kansas, affiliated with the Cherokee Nation in Oklahoma and the Caddo-Wichita Indian Tribe in Oklahoma, its individuals maintained Indian citizenship, and they have maintained tribal recognition and organization for over 100 years. On forty-one (41) occasions since removal to Oklahoma Congress has recognized these Oklahoma Delaware Tribes in legislative measures. The so-called Kansas Delawares stayed in Kansas, individually took an allotment of tribal land in Kansas in fee with power of alienation, individually took their proportionate share of trust funds held by the Delaware Tribe, took United States citizenship, renounced Delaware citizenship, obtained provisions allowing their minor children to take United States citizenship (which eventually occurred) and fully divorced themselves from the Delaware Tribe which left Kansas for parts in Oklahoma. This most significant turn of events affords a rational basis for the Congress to distribute the award recommended by the Commission regarding tribal lands to these recognized Delaware Tribes and to those on the rolls of these recognized Delaware Tribes, took land in Kansas, their share of tribal funds and became United States citizens. In *Miami Tribe of Oklahoma* v. *United States,* 281 F. 2d 202 (Ct. Cm. 1960) it is held:

> "The Indian Claims Commission found that the Indiana Miami who had remained in or who returned to Indiana without tribal consent had separated themselves from the tribe, severed their tribal relationship, and lost all right to participate in the tribal assets, funds or property. This conclusion is correct. Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309-312, 6 S.Ct. 718, 29 L.Ed. 880; Prairie Band of Potawatomi Indians v. United States, Appeal No. 2-57, decided July 16, 1958, 165 F. Supp. 139, 143 Ct. Cl.—(slip opinion, pp. 12 and 20)."

And it seems to me that the majority overlooks another significant distinction which is present with reference to the distribution made by Congress in 25 U.S.C. § 1181-6 (which the majority upholds) and the distribution made by Congress in 25 U.S.C. § 1291-7 (which the majority declares to be unconstitutional and void as possessing no rational basis) which provides rationality for the later distribution being different from the earlier distribution. The distribution made in 25 U.S.C. § 1181-6 pertained to the sale of Delaware lands in Indiana. The distribution made in 25 U.S.C. § 1291-7 pertained to the sale of Delaware lands in Kansas. After ceding the lands in Indiana the Delawares moved to Missouri and thence to Kansas. None stayed in Indiana, none took an allotment of land in Indiana in fee, none took their proportionate share of tribal funds and none took United States citizenship. The Delawares in Kansas maintained tribal identity. Whereas, when the Kansas lands were ceded a vastly different turn of events ensued as above pointed out and which will not be repeated. This significant difference provides rationality for the distribution made in 25 U.S.C. § 1291-7 as distinguished from that made in the earlier distribution.

Also there was legal precedent for the distribution made by Congress in the distribution ordered in CD 72 and 298. When an award became payable to the Delaware Tribe for a strip of land in Kansas known as the Delaware "outlet" it was paid to the Oklahoma Delawares (Delaware Tribe of Indians and Absentee Delaware Tribe of Oklahoma) to the exclusion of the so-called Kansas Delawares, the same as the distribution of Congress in 25 U.S.C. § 1291-7. See ***United States*** **v.** ***Delaware Tribe of Indians,*** 427 F.2d 1218 (Ct. Cm. 1970).

Another legal precedent for the distinction made by the Congress is the ruling in *Minnesota-Chippewa Tribe* v. *United States,* 161 Ct. Cm. 258, 315 F. 2d 906 (1963) which held that public lands and public funds of Indian tribes are

tribal properties and are not held in individual ownership. The majority opinion acknowledges that the so-called Kansas Delawares do not have a vested interest in the fund. This is further rational for Congress to distribute the moneys derived from the sale of tribal lands to be paid in part (10%) to the existing and recognized Tribes and the balance to those members on the rolls of existing and recognized Tribes to the exclusion of those not members of the Tribes nor on their rolls and who over a 100 years ago had taken individual allotments of tribal land in Kansas in fee simple, had taken their individual proportionate part of the existing tribal funds, left the Tribe, renounced Tribal membership and took United States citizenship.

How much rationale must Congress have in exercising its plenary legislative authority regarding Indian affairs? Assuming that some rationale must be present, which is doubted as to the exercise of the unique plenary power of Congress in Indian matters, there is in any event an abundance shown by the record. Congress had before it another Bill which would have distributed CD 72 and 298 funds in exactly the same manner as the wrongful and horrendous distribution made in CD 337. Congress rejected this Bill with full knowledge that there were some people claiming Delaware ancestry and entitlement to Delaware Tribal funds who would not be included within this distribution to the two recognized Delaware Tribes in Oklahoma and those on their membership rolls. Congress distributed appropriated funds by 25 U.S.C. § 1291-7 with full knowledge that it was a different distribution from that made by 25 U.S.C. § 1181-6. This was not a Congressional mistake. It was deliberate Congressional action and in the face thereof the majority would strike down 25 U.S.C. § 1291-7 and advise Congress that it erred and must legislate again and in doing so must include the so-called Kansas Delawares but need not include the Munsee Delawares or the Christian Delawares or any other Delawares not

belonging to the recognized Oklahoma Tribes. What will be the result if Congress declines to permit the Court to legislate for it regarding its plenary power in Indian affairs? It could be that Congress will decline to change its position for it acted rightly and within its authority or perhaps Congress will balk and refuse to distribute anything to anyone which is also within its power under the Indian Claims Commission Act. It is my belief and position that if in fact Congress has made a plain and grievous error regarding the so-called Kansas Delawares in the passage of 25 U.S.C. § 1291-7 (which I do not believe to be the case) upon petition and showing to the Congress by those aggrieved the Congress may correct the error and by virtue of its plenary power over Indian affairs the Congress is the only agency of the Government with power and authority to entertain Plaintiffs' complaint.

/s/ FRED DAUGHERTY
Fred Daugherty
United States District Judge

(Caption Omitted in Printing)

(Filed December 18, 1975)

Judgment

Pursuant to the findings of fact and conclusions of law appearing in the opinion of the court it is ordered, adjudged and decreed as follows:

1. That this judgment, together with the court's opinion expressing its findings and conclusions, shall determine the rights between the parties to these actions and between the plaintiff Kansas Delaware class, and the defendant Cherokee Delaware class and the defendant Absentee Delaware class, as defined in the court's order entered November 18, 1974, approving forms of class action notice and procedures for giving notice, and the court's orders entered November 1 and 4, 1974, pertaining to class action procedures;

2. That Pub. L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186, is hereby declared valid and constitutional; that the preliminary injunction entered on March 21, 1974, in Civ-73-586-E, Wanda June Weeks v. United States of America, et al, is vacated as to all restraint against distribution by the defendant Secretary of the Interior, his agents and employees, of the judgment funds appropriated to satisfy the award entered in Indian Claims Commission Docket No. 337, and the increments of interest thereon; and that all relief sought by the plaintiffs and the plaintiff Kansas Delaware class in these actions pertaining to said statute, award and judgment funds is denied;

3. That it is adjudged that the provisions of Pub. L. 92-456, 86 Stat. 762, 25 USCA §§ 1291-1297, are valid insofar as they provide for the inclusion of the defendant Cherokee Delaware class and the defendant Absentee Delaware class in the distribution of the judgment funds appropriated to satisfy the award entered in Indian Claims

Commission Dockets Nos. 72 and 298; that, however, said statute makes irrational, arbitrary and unconstitutional classifications for the distribution of said judgment funds in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution by invalidly excluding therefrom the plaintiff Kansas Delaware class; that the portions thereof making the unconstitutional classifications and exclusion are not severable from the remainder of said statute; that, therefore, the invalid provisions of said statute render it invalid, void, and unenforceable as a whole, as presently enacted; that the judgment funds appropriated to satisfy said award in Docket Nos. 72 and 298 and the increments of interest thereon are under the control of the Defendant Secretary of the Interior and required to be dispersed and credited pursuant to said distribution statute, unless equitable relief is granted; and that, therefore, the defendant Secretary of the Interior, his agents and employees are enjoined and restrained from distributing and crediting any of the judgment funds appropriated to satisfy said award under the provisions of 25 USCA §§ 1291-1297, and the increments of interest thereon, it being provided that such restraint shall continue only to and until an amendment of the distribution provisions of said statute is enacted and approved, or until a further statute providing for distribution of said funds is enacted and approved.

4. That all other relief sought by the pleadings and motions of the parties, and which is not granted by this judgment, is denied.

/s/ William J. Holloway, Jr.
William J. Holloway, Jr.
United States Circuit Judge

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

(Caption Omitted in Printing)

(Filed January 16, 1976)

Notice of Appeal

Defendants, The Delaware Tribal Business Committee, Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine, and Y. A. Scott, and intervenor, The Delaware Tribe of Indians, appeal to the Supreme Court of the United States from the final judgment of this court entered December 18, 1975, declaring Pub.L. 92-456, 86 Stat. 762, 25 U.S.C. §§ 1291-97 (Supp. III 1973) invalid, void, and unenforceable as a whole, as presently enacted, and enjoining defendant Secretary of the Interior, his agents, and employees from distributing and crediting any of the judgment funds appropriated to satisfy the awards entered in Indian Claims Commission Docket Nos. 72 and 298 and the increments of interest thereon under the provisions of 25 U.S.C. §§ 1291-97. Defendants do not appeal this Court's declaration concerning Pub.L. 90-508, 82 Stat. 861, 25 USCA §§ 1181-1186.

This appeal is taken pursuant to 28 U.S.C. §§ 1252, 1253, and 2282 (1970). A three-judge district court was convened to hear and determine this cause of action pursuant to 28 U.S.C. §§ 2282 and 2284 (1970). Said court has entered a final order granting a permanent injunction against execution of an Act of Congress, 25 U.S.C. §§ 1291-97, on grounds that it is unconstitutional, and the Secretary of the Interior of the United States of America is a party of this action. Appellants have at all times claimed that this court was without jurisdiction to hear this matter and that

said Act of Congress is constitutional and otherwise lawful as enacted.

Respectfully submitted,

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(Attorneys for Defendant Delaware Tribal Business Committee, and members of said Committee and for the Intervenor Delaware Tribe of Indians.)

Dated: January 16, 1976

(Certificate of Service Omitted in Printing)

25 U.S.C. §§ 1181-1186 (1970)

§ 1181. Distribution of judgment fund; preparation of Indian roll; eligibility

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census role as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States. Applications for enrollment must be filed with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on forms prescribed for that purpose. All applications filed shall be reviewed and a judgment of the eligibility of each applicant will be made and recommendation given in writing to the respective area directors by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of names to the Secretary of the Interior for acceptance on the distribution roll. The determination of the Secretary regarding the utilization of available rolls or records and the eligibility for enrollment of an applicant shall be final.

Pub.L. 90-508, § 1, Sept. 21, 1968, 82 Stat. 861.

§ 1182. Division between Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma.

There shall be withdrawn from the funds on deposit in the Treasury of the United States to the credit of the Delaware Nation that were appropriated by the Act of October 7, 1964 (78 Stat. 1033), and the interest accrued thereon, using the interest fund first, $7,000, which shall be divided equally between the Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma, and shall be available for claims expenses incurred by the duly authorized personnel of the two tribal groups, as set forth in their joint resolution numbered 4-68 adopted on September 9, 1967.

Pub.L. 90-508, § 2, Sept. 21, 1968, 82 Stat. 861.

References in Text. The Act of October 7, 1964 (78 Stat. 1033), referred to in text, is the Supplemental Appropriation Act, 1965, Pub.L. 88-635. The portion of Pub.L. 88-635 which appropriated the funds referred to was not classified to the Code.

§ 1183. Equal share distribution

After the deduction of attorney fees and expenses, litigation expenses, all costs incident to the provisions of sections 1181-1186 of this title, and to making the payments authorized by sections 1181-1186 of this title, including the cost of roll preparation, which shall be paid by appropriate withdrawals from the judgment fund, the unexpended balance of the funds on deposit in the Treasury shall be distributed in equal shares to those persons whose names appear on the role prepared in accordance with section 1181 of this title. No person shall be entitled to more than one per capita share of the funds.

Pub.L. 90-508, § 3, Sept. 21, 1968, 82 Stat. 862.

§ 1184. Heirs of deceased enrollees

The Secretary shall distribute a share payable to a living enrollee directly to such enrollee. The Secretary shall distribute the per capita share of a deceased enrollee to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary whose findings upon such proof shall be final and conclusive. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests.

Pub.L. 90-508, § 4, Sept. 21, 1968, 82 Stat. 862.

§ 1185. Tax exemption

The funds distributed under the provisions of sections 1181-1186 of this title shall not be subject to Federal or State income tax.

Pub.L. 90-508, § 5, Sept. 21, 1968, 82 Stat. 862.

§ 1186. Rules and regulations

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1181-1186 of this title, including a deadline for filing enrollment applications.

Pub.L. 90-508, § 6, Sept. 21, 1968, 82 Stat. 862.

* * * * * * * * * *

25 U.S.C. §§ 1291-97 (Supp. IV, 1974)

§ 1291. Disposition of funds

The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298, and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.

Pub.L. 92-456, § 1, Oct. 3, 1972, 86 Stat. 762.

References in Text. Act of Dec. 26, 1969 (83 Stat. 447, 453), referred to in the text, is Pub.L. 91-166, the Supplemental Appropriation Act, 1970, which was not classified to the Code.

§ 1292. Membership roll requirements

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

(a) they were born on or prior to and were living on October 3, 1972; and

(b) they are citizens of the United States; and

(c) (1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

Pub.L. 92-456, § 2, Oct. 3, 1972, 86 Stat. 762.

§ 1293. Applications for enrollment; filing date and place; notice and appeal of rejections; review

All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972, and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant

is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant.

Pub.L. 92-456, § 3, Oct. 3, 1972, 86 Stat. 762.

§ 1294. Apportionment, credit, and disposition of funds

(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to

each person enrolled pursuant to section 1292(c) (1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided,* That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

Pub.L. 92-456, § 4, Oct. 3, 1972, 86 Stat. 762.

§ 1295. Payments to adults; trusts for minors and persons under legal disability

Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

Pub.L. 92-456, § 5, Oct. 3, 1972, 86 Stat. 763.

§ 1296. Income tax exemption

None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

Pub.L. 92-456, § 6, Oct. 3, 1972, 86 Stat. 763.

§ 1297. Rules and regulations

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title.

Pub.L. 92-456, § 7, Oct. 3, 1972, 86 Stat. 763.

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Treaty of May 6, 1854, 10 Stat. 1048

FRANKLIN PIERCE,

President of the United States of America:

May 6, 1854

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a Treaty was made and concluded at the City of Washington, on the sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-con-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Charles Journeycake; Que-sha-to-wha, or John Ketchem; Pendoxey, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner; they being thereto duly authorized by said tribe; which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded at the City of Washington this sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-con-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Charles Journeycake; Que-sha-to-wha, or John Ketchem; Pondoxy, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner, they being thereto duly authorized by said tribe:

Article 1. The Delaware tribe of Indians hereby cede, relinquish, and quitclaim to the United States, all their right, title, and interest in and to their country lying west

of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, which is described in the article supplementary to the treaty of October third, one thousand eight hundred and eighteen, concluded, in part, on the twenty-fourth September, one thousand eight hundred and twenty-nine, at Council Camp, on James' fork of White river, in the State of Missouri; and finally concluded at Council Camp, in the fork of the Kansas and Missouri rivers, on the nineteenth October, one thousand eight hundred and twenty-nine; and also their right, title, and interest in and to the "outlet" mentioned and described in said supplementary article; excepting that portion of said country sold to the Wyandot tribe of Indians, by instrument sanctioned by act of Congress, approved July twenty-fifth, one thousand eight hundred and forty-eight, and also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the half-breed Kanzas, forty miles, in a direct line, west of the boundary between the Delawares and Wyandots, thence north ten miles, thence in an easterly course to a point on the south bank of Big Island creek, which shall also be on the bank of the Missouri river where the usual high-water line of said creek intersects the high-water line of said river.

Article 2. The United States hereby agreed to have the ceded country (excepting the said "outlet") surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed—such survey to be commenced and prosecuted as the President of the United States may deem best. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of the public lands; and such of the lands as may not be sold at the public sales,

shall thereafter be subject to private entry, in the same manner that private entries are made of United States lands; and any, or all, of such lands as remain unsold, after being three years subject to private entry, at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

ARTICLE 3. The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release, and quitclaim to the United States, the said tract of country hereinbefore described as the "outlet." And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing, and selling the same.

ARTICLE 4. The Delaware Indians have now, by treaty stipulation, the following permanent annuities, to wit: one thousand dollars per fourth article of the treaty of third August, one thousand seven hundred and ninety-five. Five hundred dollars, per third article of the treaty of thirtieth of September, one thousand eight hundred and nine. Four thousand dollars per fifth article of the treaty of the third October, one thousand eight hundred and eighteen. One thousand dollars per supplemental treaty of twenty-fourth September, one thousand eight hundred and twenty-nine. One hundred dollars for salt annuity, per third article of the treaty of June seventh, one thousand eight hundred and three. Nine hundred and forty dollars, for blacksmith annuity, per sixth article of the treaty of third October, one thousand eight hundred and eighteen. All which several permanent annuities they hereby relinquish and forever

absolve the United States from the further payment thereof; in consideration whereof the United States agree to pay to them, under the direction of the President, the sum of one hundred and forty-eight thousand dollars, as follows: seventy-four thousand dollars in the month of October, one thousand eight hundred and fifty-four, and seventy-four thousand dollars in the month of October, one thousand eight hundred and fifty-five. The object of converting the permanent annuities into these two payments being to aid the Delawares in making improvements on their present farms, and opening new ones on the land reserved, building houses, buying necessary household furniture, stock, and farming utensils, and such other articles as may be necessary to their comfort.

ARTICLE 5. It is agreed that the sum of forty-six thousand and eighty dollars, being the value of the thirty-six sections of land set apart for school purposes by the supplemental treaty of one thousand eight hundred and twenty-nine, remain for the present at five per cent, interest, as stipulated by the resolution of the Senate of the nineteenth January, one thousand eight hundred and thirty-eight.

ARTICLE 6. The Delawares feel now, as heretofore, grateful to their old chiefs for their long and faithful services. In former treaties, when their means were scanty, they provided, by small life-annuities, for the wants of these chiefs, some of whom are now receiving them. These chiefs are poor, and the Delawares believe it their duty to keep them from want in their old and declining age. It is the wish of the Delawares, and hereby stipulated and agreed, that the sum of ten thousand dollars, the amount provided in the third article as a consideration for the "outlet," shall be paid to their five chiefs, to wit: Captain Ketchem, Sarkoxey, Segondyne, Neconhecond, and Kock-ka-to-wha, in equal shares of two thousand dollars each, to be paid as follows: to each of said chiefs, annually, the sum of two hundred and fifty dollars, until the whole sum is paid: *Provided*, That if

any one or more of said chiefs die before the whole or any part of the sum is paid, the annual payments remaining to his share shall be paid to his male children, and in default of male heirs, then to the legal representatives of such deceased chief or chiefs; and it is understood that the small life-annuities stipulated for by former treaties, shall be paid as directed by said treaties.

ARTICLE 7. It is expected that the amount of moneys arising from the sales herein provided for, will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary.

ARTICLE 8. As the annual receipts from the sales of the lands cannot now be determined, it is agreed that the whole subject be referred to the judgment of the President, who may, from time to time, prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment, also how much shall be invested, and in distributing the funds to the people, due regard and encouragement shall be given to that portion of the Delawares who are competent to manage their own affairs, and who know and appreciate the value of money; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

ARTICLE 9. The debts of Indians, contracted in their private dealings as individuals, whether to traders or otherwise, shall not be paid from the general fund.

ARTICLE 10. The Delawares promise to renew their efforts to suppress the introduction and the use of ardent spirits in their country and among their people, and to encourage industry, integrity, and virtue, so that every one may become civilized, and, as many now are, competent to manage their business affairs; but should some of them, unfortunately continue to refuse to labor, and remain or become dissipated and worthless, it shall be discretionary with the President to give such direction to the portion of funds, from time to time, due to such persons, as will prevent them from squandering the same, and secure the benefit thereof to their families.

ARTICLE 11. At any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: *Provided,* such assignment shall be uniform.

ARTICLE 12. In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law, shall have a right of way through the reserved lands, on the same terms that the law provides for their location through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right of way, on payment of a just compensation therefor in money.

ARTICLE 13. The Christian Indians live in the country herein ceded, and have some improvements. They desire to remain where they are, and the Delawares are willing, pro-

vided the Christian Indians can pay them for the land. It is therefore agreed that there shall be confirmed by patent to the said Christian Indians, subject to such restrictions as Congress may provide, a quantity of land equal to four sections, to be selected in a body from the surveyed lands, and to include their present improvements: *Provided,* The said Christian Indians, or the United States for them, pay to the Secretary of the Interior for the use of the Delaware Indians, within one year from the date of the ratification of this treaty, the sum of two dollars and fifty cents per acre therefor: *And provided further,* That the provisions of article twelve, in relation to roads, highways, and railroads, shall be applicable to the land thus granted to the Christian Indians.

ARTICLE 14. The Delawares acknowledge their dependence on the government of the United States, and invoke its protection and care. They desire to be protected from depredations and injuries of every kind, and to live at peace with all the Indian tribes; and they promise to abstain from war, and to commit no depredations on either citizens or Indians; and if, unhappily, any difficulty should arise, they will at all times, as far as they are able, comply with the law in such cases made and provided, as they will expect to be protected and their rights vindicated by it, when they are injured.

ARTICLE 15. A primary object of this instrument being to advance the interests and welfare of the Delaware people, it is agreed, that if it prove insufficient to effect these ends, from causes which cannot now be foreseen, Congress may hereafter make such further provision, by law, not inconsistent herewith, as experience may prove to be necessary to promote the interests, peace, and happiness of the Delaware people.

ARTICLE 16. It is agreed by the parties hereto, that the provisions of the act of Congress, approved third of March, one thousand eight hundred and seven, in relation to lands

ceded to the United States, shall, so far as applicable, be extended to the lands herein ceded.

ARTICLE 17. It is further stipulated, that, should the Senate of the United States reject the thirteenth article hereof, such rejection shall in no wise affect the validity of the other articles.

ARTICLE 18. This instrument shall be obligatory on the contracting parties as soon as the same shall be ratified by the President, and the Senate, of the United States.

In testimony whereof the said George W. Manypenny, commissioner as aforesaid, and the said delegates of the Delaware tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year herein-before written.

GEORGE W. MANYPENNY, *Commissioner.* [L. S.]
SARCOXEY, his x mark.
NE-CON-HE-COND, his x mark. [L. S.]
KOCK-KA-TO-WHA, his x mark. [L. S.]
QUA-COR-NOW-HA, or James Segondyne, his x mark. [L. S.]
NE-SHA-TO-WHA, or John Ketchem, his x mark. [L. S.]
QUE-SHA-TO-WHA, or John Ketchem, his x mark.
PONDOXY, or George Bullet, his x mark. [L. S.]
KOCK-KOCK-QUAS, or James Ketchem. [L. S.]
AH-LAH-A-CHICK, or James Conner, his x mark. [L. S.]

Executed in the presence of:

THOS. JOHNSON.
CHARLES CALVERT.
DOUGLAS H. COOPER.
WM. B. WAUGH.
HENRY BEARD.
B. F. ROBINSON, *Indian Agent.*
HENRY TIBLOW, *U.S. Interpreter.*

And whereas the said Treaty having been submitted to the Senate of the United States for its constitutional action

thereon, the Senate did, on the eleventh day of July, one thousand eight hundred and fifty-four, ratify the same by a resolution in the words following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

July 11, 1854.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at the City of Washington this sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-hon-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Charles Journeycake; Que-sha-to-wha, or John Ketchem; Pendoxey, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner; they being thereto duly authorized by said tribe.

Attest: ASBURY DICKINS, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eleventh day of July, one thousand eight hundred and fifty-four, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this seventeenth day of July in the year of our Lord one thousand eight [L.S.] hundred and fifty-four, and of the Independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State.*

TREATY OF JULY 4, 1866, 14 STAT. 793.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at the Delaware Agency, Kansas, on the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-six, by and between Thomas Murphy, John G. Pratt, and William H. Watson, Commissioners, on the part of the United States, and Captain John Connor, Captain Sarcoxie, Charles Journeycake, and other chiefs and councillors of the Delaware tribe of Indians, on the part of said tribe of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:—

ARTICLES OF AGREEMENT between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

WHEREAS Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas; and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas; and whereas the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same; and whereas the Missouri River Railroad Company, a

corporation existing in the State of Kansas by the laws thereof,—and which company has built a railroad connecting with the Pacific Railroad, from near the mouth of the Kaw River to Leavenworth, in aid of which road the Delawares, by treaty in eighteen hundred and sixty-four, agreed to dispose of their lands,—has expressed a desire to purchase the present Delaware Indian reservation in the said State, in a body, at a fair price:

It is hereby agreed between Thomas Murphy, superintendent of Indian affairs, John G. Pratt, agent for the Delawares, and William H. Watson, special commissioner, who are duly appointed to act for the United States; and Captain John Connor, Captain Sarcoxie, and Charles Journeycake, chiefs, and James Ketchum, James Connor, Andrew Miller, and John Sarcoxie, councillors, duly appointed and authorized by said Delaware Indians to act for them and in their behalf, to wit:—

ARTICLE I. That the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee, and Western Railroad Company, according to the terms of a treaty ratified August twenty-second, eighteen hundred and sixty, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof.

ARTICLE II. That the Secretary of the Interior shall be, and he is, authorized to sell to said Missouri River Railroad Company, or to other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe in the State of Kansas not previously disposed of, except as

hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

ARTICLE III. It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States: and the lands of all such Indians as may elect so to become citizens, together with those of their minor children, held by them in severalty, shall be reserved from the sale hereinbefore provided for. And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty, to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the Secretary of the Interior, when the department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on his new home therein: *Provided,* That whenever it shall be ascertained under the registry above provided for what lands will be vacated, there shall be set apart from the lands held in common, for each child of Delaware blood, born since the allotment of land to said tribe in severalty was made under previous treaties, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain may be made from lands which are to be vacated by those who elect to remove: *And provided further,* That in case there shall be improvements upon any heretofore allotted

lands, so selected for children of the Delawares, payment shall be made for such improvements, at their appraised value, by the parents or guardians of said children, at the same time as if the said lands had been sold to the railroad company or other parties.

ARTICLE IV. The United States agree to sell to the said Delaware Indians a tract of land ceded to the government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

ARTICLE V. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

ARTICLE VI. It is agreed that the proceeds of the sale of the Delaware lands herein provided for shall be paid

to said Indians in the manner following, to wit: Whenever the Department of the Interior shall be notified by the council, through the agent, that any of the Delawares who hold land in severalty are ready to remove, at the same time describing their allotments, there shall be paid to each such person the value of his allotment, and that of his family, to enable him to remove to and improve his new home, provided the money for the said allotment shall have been paid to the Secretary of the Interior; and while said money, or any part thereof, shall remain in the treasury of the United States, the Delawares shall be entitled to receive interest on the amount so retained at the rate of five (5) per cent per annum. And the residue of the proceeds of the sale of the Delaware lands, being those which have not been allotted, or which have once been allotted, but have been abandoned by the allottees, shall be added to the general fund of the Delawares, interest thereon to be paid to the Indians in the same manner as is now provided in regard to that fund.

ARTICLE VII. Within thirty days after the ratification of this treaty it shall be the duty of the Secretary of the Interior to give the said Missouri River Railroad Company notice that he is authorized to contract with them or other responsible party or parties for the sale of said lands on the terms specified in this treaty, indicating the approximate quantity thereof; and within twenty days after receiving said notice at their usual place of doing business in the State of Kansas it shall be competent for said company to elect to make the purchase, by filing with the said Secretary their bond, with approved security, in double the amount proposed to be paid by them for the whole of said lands, guaranteeing that they will purchase all of the lands to be sold under the provisions of this treaty, and that they will pay for them in accordance with the terms thereof. And upon the filing of a satisfactory bond as above provided by said company, the contract for

such purchase shall be concluded by the said Secretary with said Missouri River Railroad Company, at not less than two dollars and fifty cents per acre for the whole of the lands herein provided to be sold: *Provided, however,* That if said railroad company shall not within the twenty days above limited file its bond for the purchase as herein prescribed, the Secretary of the Interior may at the expiration of that time accept any offer for the whole of said lands in one body, at not less than two dollars and fifty cents per acre, from any other responsible parties; but no offer shall be considered from other parties than said Missouri River Railroad Company, unless accompanied by a certificate of deposit in the First National Bank of the city of Washington, D.C., to the credit of the said Secretary, for an amount equal to ten per cent of the aggregate value of the land at the price proposed, to be forfeited for the use of the Delawares if the sale should be awarded to said person or corporation so proposing to purchase the lands, and said party should fail to make payment as hereinafter provided.

ARTICLE VIII. That within sixty days after the sale of said land shall have been effected, the purchaser shall pay to the said Secretary, in trust for the Delawares, the stipulated price of said unallotted lands, with the appraised value of improvements thereon, excepting therefrom the mill reservation, and the quarter sections upon which the council-house and blacksmith shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the purchaser until possession is delivered; and from time to time thereafter, as often as the Secretary of the Interior shall notify the said purchaser that ten thousand acres or more of said lands have been vacated by said Indians, within three months thereafter, said purchaser shall pay to the Secretary of the Interior, in trust for the said Indians, the stipulated price for said lands, with the appraised value of the improvements; and

so on until all are paid for, according to the true intent and meaning hereof; and as said lands shall be paid for, patents therefor, conveying the same in fee simple, shall be from time to time issued to said purchaser, or to his or its assigns, by the President of the United States.

ARTICLE IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have

become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and in interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

ARTICLE X. It is further agreed that the funds of the Delawares shall never be applied by the government to the payment of the debt or debts of any individual member or members of the nation; nor shall any person be licensed to trade with the Delawares without the consent of the chiefs and council; and the salaries of the chiefs shall henceforward be four hundred dollars per annum.

ARTICLE XI. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the government thereof, and ask its protec-

tion; and the United States agree to protect, preserve, and defend them in all their just rights.

ARTICLE XII. It is also agreed that if the said Secretary should not be able to sell the said lands as hereinbefore provided, he may cause the same to be appraised, in separate tracts, at their fair cash value, no tract to be value at less than two dollars and fifty cents per acre, and the same when appraised may be sold at not less than the appraised value, and for as much more as the same will bring, and the money arising from the sale to be applied and distributed as hereinbefore provided.

ARTICLE XIII. It is agreed by the Delawares that railroad companies engaged in building roads whose routes shall lie through their new reservation in the Indian country shall have a right of way through and over said lands, not exceeding two hundred feet in width for any such road, and also the right to enter on all lands and take and use such gravel, stone, and other material except timber as may be necessary for the construction of such roads, compensation to be made for any damages done in obtaining such material, and for any damages arising from the location or running of such roads to improvements which shall have been made before such road shall have been located, such damages to be ascertained under regulations to be prescribed by the Secretary of the Interior.

ARTICLE XIV. The United States further agree that, in accordance with the general provisions of the sixth article of the Delaware treaty of May thirty, eighteen hundred and sixty, which have not yet been fulfilled, there shall be credited to the Delawares, in the purchase of their new reservation in the Indian country, the sum of thirty thousand dollars, which credit by the United States shall be received by the Delawares as a full settlement of all claims against the government for depredations upon timber to the date of the signing of this treaty; and the Delawares shall receive, without cost, from the United States, land included within their new reservation to the amount of

twenty-three sections, in place of the twenty-three sections of half-breed Kaw lands referred to in said sixth section of the treaty of eighteen hundred and sixty; and inasmuch as the Delaware claim that a large amount of stock has been stolen from them by whites since the treaty of eighteen hundred and fifty-four, the United States agree to have a careful examination of such claims made under the direction of the Secretary of the Interior, and when the value of such stolen stock shall have been ascertained, the same shall be reported to Congress with a recommendation for an appropriation to pay for the same; and all moneys appropriated for such purpose shall be paid to the owners of said stock.

ARTICLE XV. It is also agreed by the contracting parties that nothing contained in this treaty shall be so construed as to require the Delawares to remove from their present homes, until after they shall have selected and received title to lands for new homes elsewhere.

In testimony whereof, the said superintendent, agent, and special commissioner, on behalf of the United States, and the said chiefs and councillors on behalf of the Delawares, have hereunto set their hands and seals this fourth day of July, one thousand eight hundred and sixty-six.

THOS. MURPHY, [SEAL.]
Superintendent.

JOHN G. PRATT, [SEAL.]
Agent.

W. H. WATSON, [SEAL.]
Special Commissioner,

JOHN CONNOR, his x mark, [SEAL.]
Head Chief.

CAPTAIN SARCOXIE, his x mark, [SEAL.]
Assistant Chief.

CHARLES JOURNEYCAKE, [SEAL.]
Assistant Chief.

JAMES KETCH[U]M, [SEAL.]
JAMES CONNOR, his x mark, [SEAL.]
ANDREW MILLER, his x mark, [SEAL.]
JOHN SARCOXIE, his x mark, [SEAL.]
Councillors.

ISAAC JOHNYCAKE,
U. S. Interpreter.

In presence of—

HENRY S. BULKLEY.
EDWARD S. MENAGER.
LOUIS A. MENAGER.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-sixth day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, by a resolution in the words and figures following to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES
July 26, 1866.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement between the United States and Delaware Indians, made at the Delaware Agency, Kansas, on the fourth day of July, one thousand eight hundred and six-six.

Attest: J. W. FORNEY, *Secretary.*

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-sixth of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this tenth day of August, in the year of our Lord one thousand
[SEAL.] eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

ANDREW JOHNSON.

By the President:

HENRY STANBERY, *Acting Secretary of State.*

Supreme Court, U. S.
FILED
JUL 29 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*, *Appellants*,
v.
WANDA JUNE WEEKS, *Appellee*.

No. 75-1335

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, *et al.*, *Appellants*,
v.
WANDA JUNE WEEKS, *et al.*, *Appellees*.

No. 75-1495

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *et al.*, *Appellants*,
v.
WANDA JUNE WEEKS, *et al.*, *Appellees*.

Appeals from the United States District Court
For The Western District of Oklahoma

No. 75-1301 Filed March 12, 1976
No. 75-1335 Filed March 16, 1976
No. 75-1495 Filed April 15, 1976
Probable Jurisdiction Noted June 14, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*, *Appellants*,

v.

WANDA JUNE WEEKS, *Appellee*.

No. 75-1335

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, *et al.*, *Appellants*,

v.

WANDA JUNE WEEKS, *et al.*, *Appellees*.

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THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *et al.*, *Appellants*,

v.

WANDA JUNE WEEKS, *et al.*, *Appellees*.

Appeals from the United States District Court
For The Western District of Oklahoma

INDEX

	Page
I. Chronological List of Relevant Docket Entries	2
II. Relevant Pleadings	6
Complaint of Wanda June Weeks	6
Answer, Federal Defendants	17
Amendment to Complaint	21
Verified Motion of Plaintiff Wanda June Weeks for Order Directing That This Action Proceed as a Class Action	26
Pre Trial Order	34
Order of Nov. 1, 1974	40
Amendment to Order of Nov. 1, 1974	45
Order Approving Forms of Class Action Notice and Procedures for Giving Notice w/Exhibits	46
Amendment to Answer of Delaware Tribal Business Comm.	59
Reporter's Transcript of Trial Proceedings	63
III. The Judgment, Order and Decision	73
IV. Parts of the Record to Which the Parties Wish to Direct the Court's Particular Attention	73
Plaintiff's Exhibit 1: Verification of Eligibility to Share in Delaware Judgment Funds (Wanda June Weeks)	73
Plaintiff's Exhibit 4: Letter from Duard R. Barnes to Wanda June Weeks, August 16, 1973.	75
Excerpts from Plaintiff's Exhibit 51c: Memorandum to Commissioner of Indian Affairs from Division of Tribal Operations, MAO	78

Index Continued

	Page
Letter to Secretary of the Interior from Wanda June Weeks	79
Letter to Wanda June Weeks from Jacob Ahtone, June 5, 1973	80
Letter to Hon. Lloyd Meeds from Raymond V. Butler, May 1, 1973	82
Letter to Secretary of the Interior from Wanda June Weeks	84
Letter to Wanda June Weeks from Clyde Busey, April 3, 1970	86
Letter to Wanda June Weeks from Jacob Ahtone	88
Defendants Secretary and Delaware Tribal Business Committee's Exhibit 24: Resolution of Delaware Council, April 29, 1904	90
Excerpts from Defendants Secretary's and Delaware Tribal Business Committee's Exhibit 18: Certified Copies of Material Used in Determining Eligibility of Individuals	96
Letter to Secretary of the Interior from Richard C. Adams, January 25, 1905	96
Letter to U.S. Indian Agent from L. F. Larrabee, March 22, 1905	98
Defendants Secretary's and Delaware Tribal Business Committee's Exhibit 25: Resolution Establishing By-Laws Under Which the Delaware Tribal Business Committee Shall Speak and Act in Behalf of the Delaware Tribes of Indians	101
Supreme Court Order Noting Probable Jurisdiction	107

I. CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

8-28-73—Filed Complaint.

8-28-73—Filed Notice of Requirement of 3-Judge Dist. Ct.

9-7-73—Filed Order that Ct. be constitute of William J. Holloway, Jr., Frederick A. Daugherty, & Luther B. Eubanks (David T. Lewis, Chief Judge, 10th CCofA).

11-16-73—Filed Delaware Tribal Bus.', Townsend, Young, Crow, Secondine, & Scott's Ans.—w/s.

12-17-73—Filed dfts USA's, Morton's, Dela. Tribe's, Church's, Murray's, & Rose' Answer—w/s.

1-25-74—Filed plf's Amendment to Complaint—w/s LEAVE GRANTED TO FILE (Eubanks).

1-29-74—PRETRIAL, Feb. 28, 11:30 a.m. (Eubanks).

2-11-74—Filed plf's Verified Mtn for Order Directing That This Action Proceed as a Class Action—w/s.

3-13-74—Ent Further Pretrial (Eubanks) zmc.

3-13-74—Filed Pretrial Order (Eubanks).

3-21-74—Filed Prel. Inj.; dft Morton, Sec. of Int., & his delegates, etc., who receive actual notice hereof are enj'd, pdg final determ. of action, from releasing or distributing, etc., any of funds held or controlled by said dft, et al., appropriated by Congress to satisfy judgs in Indian Claims Commission Dkt 337, 72, & 298, save sum of $28,000 thereof which is excepted herefrom so that such funds may be applied as herein above set forth; nothing herein shall be construed to order or direct, said dft to make aforementioned applications or expenditures of said $28,000 or any part thereof (Eubanks).

4-9-74—Filed dfts' Mtn to Dism (USA's, et al.).

4-16-74—Filed plf's Mtn for S. J.

4-22-74—Filed Order consolidating Case No. 74-368-D with Case No. 73-586-E for joint hearing or trial pursuant to Rule 42(a) FRCiv.P (Daugherty) copies to cnsl and judges—ve.

4-23-74—Filed dfts Delaware Tribal Bus. Comm., Townsend, Young, Crow, Secondine, & Scott's Mtn to Dism.

5-20-74—Ent Hrg on various motions; arguments are heard; Ct takes mtns to dismiss & re jurisdiction under advisement (Holloway, Daugherty, Eubanks) —zmc.

11-1-74—Filed and entered Order—THAT dft U.S.' mtn to dism to sust'd.; pdg to dism filed by dft Morton & all dfts other than U.S. are denied; plf's pdg mtn for s.j., dft Delaware Tribal Bus. Com.'s & dfts other than U.S. & Morton mtn for partial s.j. overruled; Ct *finds* that plf class consisting • • • are so numerous that joinder of all members is impracticable • • • & *finds* that action may proceed as class action on behalf of plf class & against dft classes; ordered that there be indiv. notice by cert mail to all members of the Ks. Delaware class who can be identified, to be mailed w/in 30 days hereafter, advising that suits are being maintained, etc., that judg. will be binding on all members & any member may ent sep. appearance w/in 45 days hereafter; cnsl directed to confer promptly re things herein set out and, if any dispute, are to apply to Judge Daugherty for nec. orders w/in 15 days hereof; that notice to dft classes, Cherokee Delawares & Absentee Delawares be given w/in 30 days hereof by publ. in tribal bus. ltr or paper or newspaper of gen. circulation in accord. herewith as more fully set out and cnsl are to confer w/view to things herein set out w/same instrs to apply to Judge Daugherty if nec. as set out above; hrg will be had soon as poss. after all above has been performed (Holloway, Daugherty, & Eubanks) (COB #105)

(Clerk) (copies w/o judg. stamp to parties & 3 judges —wwm).

11-4-74—Filed and entered Amendment to Order—THAT order of 11-1-74 is amended to provide that cost of notice by cert mail to plf classes & by publ. to dft classes shall be borne by plf; prior to such notice, proposed form & manner shall be submitted to Judge Daugherty for approval • • • (Holloway, Daugherty, & Eubanks) (COB #105) (copies to parties—w/o judg.) ent'd stamp—zmc

11-18-74—Filed Order Approving Forms of Class Action Notice and Procedures for Giving Notice w/3 attachments (ALL SIGNED BY Judge Daugherty).

3-12-75—Filed Order permitting dfts, Delaware Tribal Bus. Comm, Townsend, Young, Crow, Secondine & Scott to file an amendment to their pldgs. (Eubanks) (copies mld.) zmc.

3-12-75—Filed dfts' amended answer—ws.

5-27-75—Ent Trial on Merits: "obj. Rothbaum to be taken up later." Plfs present evid. (exhs.); dfts' mtn to dism overruled & they present evid. (exhs.); rebuttal & surrebuttal had; cnsl. to submit FofF & CofL simul. w/in 20 days. (Daugherty & Holloway & Eubanks) ve.

12-18-75—Filed Memorandum Opinion (Daugherty) (COB #111) (Holloway & Eubanks joining, and Daugherty concurs in part & dissents in part).

12-18-75—Filed and ENTERED Judgment.

1-16-76, 10:15 A.M.—Filed Absentee Delaware Class' Notice of Appeal to the Supreme Ct of the U.S.—ws.

1-16-76, 2:15 P.M.—Filed dfts Delaware Tribal Business Committee, Townsend, Young, Crow, Secondine, Scott & intv. Delaware Tribe of Indians' Notice of Appeal—ws.

1-16-76, 2:30 P.M.—Filed plfs Weeks, Frazier & Rattler's Notice of Appeal—ws.

1-16-76, 2:40 P.M.—Filed dfts Stanley K. Hathaway (now Thomas J. Kleppe), indiv. & as Sec. of the Inter. of the USA's Notice of Appeal—ws.

II. RELEVANT PLEADINGS

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

WANDA JUNE WEEKS, *Plaintiff*,

v.

UNITED STATES OF AMERICA; ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA AND TRUSTEE FOR THE DELAWARE INDIAN PEOPLE; THE DELAWARE TRIBAL BUSINESS COMMITTEE; THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE; BRUCE MILLER TOWNSEND; NATHAN H. YOUNG; MARY TOWNSEND CROW; HENRY A. SECONDINE; Y. A. SCOTT; ARTHUR L. THOMAS; ALENE MARTINEZ; MYRTLE HOLDER; TOMMY HOLDER; LAWRENCE SNAKE; CHARLES TAYLOR; CLIO CHURCH; MABEL MURRAY, and GRACE SPOONER ROSE, *Defendants*.

Civ-73-586-E

Filed August 28, 1973.

Complaint

1. The Plaintiff is a citizen and resident of the United States and of Oklahoma and is a lineal descendant of Annie Grinter, deceased, a full-blood Delaware Indian who was a resident on the Delaware Indian lands in Kansas in the years 1854 to 1867.

2. The Delaware Tribal Business Committee is a group composed of the Defendants, Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott, designated and elected by some persons of Delaware Indian descent to handle business matters relating to the affairs of Delaware Indians and especially with the relations of Delaware Indians with the Government of the United States. Each of the members of

such Business Committee is a Delaware Indian and they are each a representative of a sub-class hereinafter designated the "Cherokee-Delawares."

3. The Absentee Delaware Tribe of Oklahoma Business Committee is a group composed of the Defendants, Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor, designated and elected by some persons of Delaware Indian descent to handle business matters relating to the affairs of Delaware Indians and especially regarding the relations of Delaware Indians with the Government of the United States. Each of the members of such Business Committee is a Delaware Indian and they are each representatives of a sub-class hereinafter designated the "Absentee Delawares."

4. The Defendants, Clio Church, Mabel Murray and Grace Spooner Rose, are Delaware Indians designated by some persons of Delaware Indian descent to handle business matters relating to the affairs of Delaware Indians and especially regarding the relations of Delaware Indians with the Government of the United States. Such Defendants are each representatives of a sub-class hereinafter designated the "Munsee Delawares."

5. The Plaintiff has been designated by some persons of Delaware Indian descent to handle their business matters relating to the affairs of Delaware Indians with the Government of the United States. She is representative of a sub-class hereinafter designated the "Kansas Delawares."

6. Each of the above named sub-classes are members of a class of persons who are descendants of persons of Delaware Indian blood who, in the years 1854 through 1858, lived on lands in the State of Kansas ceded to the Delaware Indians by the Government of the United States by the Treaty of 1829. Each member of the sub-classes Cherokee Delawares, Kansas Delawares and Absentee Dela-

wares are descendants of persons whose names appeared on the census rolls of the Delaware Nation established to the satisfaction of the Secretary of the Interior pursuant to the Treaty of October 3, 1818.

7. Census rolls of the Munsee Delawares exist through which it is possible to determine the present members of such sub-class, but the Munsee Delawares were separated from the main body of Delaware Indians in 1818 and their names were not included in the census rolls of 1818 although they were and are members of the Delaware Indian people and their ancestors were members of the Delaware Nation in 1818 entitled to be included on such census rolls.

8. The Delaware Indians are descendants of former tribal Indians but there is not now nor has there been for over one hundred years a Delaware Tribe or official group representative of all Delaware Indians. The Kansas Delawares were required by the Government of the United States by the Treaty of 1866 either to resign from the Tribe and become United States citizens or to move from the Delaware lands in Kansas to Indian Territory and to join the Cherokee Nation. The Kansas Delawares are those persons who elected to remain in Kansas in 1866 and to continue to live on designated and allotted lands. The Cherokee Delawares are those persons who elected to move to Indian Territory pursuant to the Treaty of 1866, to give up all tribal identification and participation as Delaware Indians, and to become citizens of the Cherokee Nation. They thereafter were Delaware Indians by blood only. The Absentee Delawares are persons who removed voluntarily from the Delaware Indians lands in Kansas in 1858 and in 1874 joined with the Caddo Indians in Indian Territory. They gave up all tribal identification and participation as Delaware Indians and became members of the Caddo Indian tribe. They thereafter were Delaware Indians by blood only. The Munsee Delawares lived on the Delaware Indian lands in Kansas in 1854 through 1858, but they

dispersed, became scattered and they gave up all tribal identification and participation as Delaware Indians and are Delaware Indians by blood only. The sub-classes together represent those Delaware Indians whose rights were affected by the treaties with the United States with the Delaware Nation in 1854, 1860, 1861 and 1866.

9. There are approximately 250 living members of the sub-class Munsee Delawares, 300 members of the sub-class Kansas Delawares, 1,400 members of the sub-class Absentee Delawares, and 11,000 members of the Cherokee Delawares. The members of each sub-class have no interest antagonistic to the other members of such sub-class and will adequately represent the sub-class of which they are members. A common relief is sought for each member of the Kansas Delawares. Because the members of the sub-classes are so numerous, because they are widely scattered and distributed throughout the United States, and because it would be prohibitively expensive and burdensome to the parties and to the Court to litigate their claims individually, a class action is superior to all other available methods for a fair and efficient adjudication of the controversy herein and is appropriate under Rule 23 of the Federal Rules of Civil Procedure.

10. This action involves a construction of two judgments entered by the Indian Claims Commission, the constitutionality of two statutes of the United States, and questions whether the Plaintiff and the members of the sub-class of which she is a member have been deprived of their rights under the Fifth Amendment to the Constitution of the United States. The Plaintiff herein seeks declaratory relief, and many federal questions are involved.

11. The amount in controversy, exclusive of interest and costs, exceeds $12,500,000.00; the amount in controversy for each member of the sub-class Kansas Delawares, of which the Plaintiff is a member, exceeds, exclusive of interest and costs, the sum of $10,000.00.

12. The United States of America is a real party in interest, it being the party against which the judgments hereinafter described were rendered and the party directly obligated to pay to the Kansas Delawares all or an aliquot part of such judgments.

13. Rogers C. B. Morton, as Secretary of the Interior of the United States, is a party designated by the laws of the United States to determine the names of those persons entitled to share in the benefits of the judgments against the United States hereinafter described.

14. This Court has jurisdiction of this action under Article III, Section 2 of the Constitution of the United States, under 28 U.S.C. § 1331 and § 1362, and 5 U.S.C. § 701 et seq. This cause is an appropriate action for the convening of a three judge court under 28 U.S.C. § 2282 and for the issuance of a temporary restraining order under 28 U.S.C. § 2284.

15. On August 5, 1963, in Docket No. 337, the Indian Claims Commission awarded a judgment in the amount of $1,627,244.64 to the "Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." On October 7, 1964, the Congress of the United States appropriated funds to pay such judgment and the Congress on September 21, 1968 in statutes appearing at 25 U.S.C. § 1181-86 provided the manner in which the judgment funds were to be distributed. Pursuant to such statutes claims were made by persons who claimed to be entitled to share therein and distribution has been made of some of such funds to members of the sub-classes Kansas Delawares, Absentee Delawares and Cherokee Delawares. No payment was made to members of the sub-class Munsee Delawares pending a determination of the existing controversy as to whether they are entitled to share in such judgment. Such controversy exists and is unresolved. The Plaintiff believes, and so alleges, that the Secretary of the Interior holds

such undistributed funds in trust for the parties entitled thereto.

16. On September 10, 1969, in Docket Nos. 72 and 298 the Indian Claims Commission awarded judgment in the amount of $9,194,364.99 to the Delaware Indian people. Such judgment arose out of violations of the treaty obligations of the United States to the Delaware Indians residing on the Delaware Indian lands in Kansas which were taken by the United States by the Treaty of 1854 under a promise that such lands would be sold for the benefit of the Delaware Indians in a manner calculated to obtain a reasonable price. Such lands were sold but not in the manner provided by such Treaty, and the Delaware Indians whose rights were affected by the Treaty of 1854 were damaged. The proceeds which were received from such sale were used for the benefit of sub-classes Kansas Delawares, Absentee Delawares and Cherokee Delawares, but were not shared by the Munsee Delawares.

17. Upon the entry of said jugment in Docket Nos. 72 and 298 those persons who were members of the class comprising the Delaware people became vested with an interest therein which could not be taken without due process of law and without just compensation.

18. On December 26, 1969, Congress appropriated funds to pay the judgment entered in said Docket Nos. 72 and 298, such funds to be distributed in the manner to be determined by appropriate legislation.

19. On October 3, 1972, the Congress enacted Public Law 92-456 (86 Stat. 762), 25 U.S.C. §§ 1291-1297 in which the Secretary of the Interior was directed to distribute the funds appropriated to pay the judgments in said Docket Nos. 72 and 298 in a manner calculated to exclude the Kansas Delawares and the Munsee Delawares, all of whom were members of the Delaware Nation, were Delaware people, and who were beneficiaries of such judgments as

intended by the Indian Claims Commission. The method for determining the persons entitled to share in such judgment was arbitrary, capricious and violative of the rights of the members of the Kansas Delawares and Munsee Delawares to due process of law, and to not have their valuable rights taken without just compensation as protected by the Fifth Amendment to the United States Constitution. Such act of Congress was and is unconstitutional unless construed to enable the Secretary of the Interior to include in the persons entitled to share in such judgment the Kansas Delawares and the Munsee Delawares.

20. The Kansas Delawares and Munsee Delawares are the only Delaware Indians who have not given up their identity as Delaware Indians by joining other tribes of Indians and by sharing in benefits of treaties and judgments as members of the tribes with which they joined. If the benefits of said judgments 72 and 298 are to be distributed only to those persons who have remained members of the Delaware Nation by not voluntarily joining other tribes of Indians, then the Kansas Delawares and the Munsee Delawares should be the only beneficiaries of said judgment Nos. 72 and 298. If the Munsee Delawares are to be excluded because they were not on the rolls of those Delaware Indians who shared in the trust fund created by virtue of the illegal sales of Delaware Indian lands pursuant to the Treaty of 1854 out of which judgment arose, then the Kansas Delawares are the only persons entitled to the benefits of judgments No. 72 and 298, in which case the Plaintiff's share and the share of each member of the Kansas Delawares is approximately $38,000.00. If the Kansas Delawares and the Munsee Delawares are the only persons entitled to the benefits of such judgments No. 72 and 298, the share of each beneficiary is approximately $22,-700.00. If all of the members of the sub-class described herein share in such judgments No. 72 and 298, the share of each beneficiary is approximately $1,000.00. An actual controversy exists as to the identity of the parties entitled

to share in the benefits of the judgments entered in Docket No. 337, 72 and 298 and the amounts of such shares.

21. Pursuant to said law enacted to determine the manner in which the benefits of such judgments were and are to be distributed, members of each sub-class duly filed claims with the Secretary of the Interior. The claims of the Munsee Delawares were denied as to the judgment entered in Docket No. 337. The claims of the Kansas Delawares and the Munsee Delawares were denied as to Docket Nos. 72 and 298. Both of such judgments were identical as to the intended beneficiaries thereof and the acceptance of the members of the Kansas Delawares as members of the Delaware Nation for the purpose of Docket No. 337 was an acknowledgment by the United States that the Kansas Delawares were members of the Delaware Indian people. The exclusion of such persons in the determination of the beneficiaries of the judgment in Docket Nos. 72 and 298 was an unconstitutional and arbitrary deprivation of the valuable property rights of the Kansas Delawares entitling them to the relief sought herein. The Absentee Delawares and the Cherokee Delawares contend that the Kansas Delawares were entitled to share in the judgment at Docket No. 337, but contend that they are not entitled to share in judgment at Docket Nos. 72 and 298. The Absentee Delawares and the Cherokee Delawares contend that the Munsee Delawares are not entitled to share in either judgment. The Kansas Delawares contend that they are entitled to share in judgment Docket No. 337 and have received some funds from the distribution thereof. They also contend that they are beneficiaries of all or a part of the funds appropriated to pay the judgment entered in Docket No. 72 and 298, depending on whether the Court determines that the beneficiaries thereof include former Delaware Indians who joined other tribes. An actual controversy exists between the Plaintiff and the members of the class she represents and the other sub-classes represented herein and against the United States of America and the Secretary of the

Interior. All parties have exhausted their appeals and administrative remedies and they have no adequate remedy at law.

22. The Absentee Delaware Tribe of Oklahoma Business Committee and the members thereof and the Delaware Tribal Business Committee and the members thereof were permitted to and they did represent the Delaware Indian people in pursuing the claims culminating in the judgments referred to herein. They and their duly appointed counsel have been and are now in a fiduciary relationship with the members of the Delaware Indian people. They are presently pursuing other and further claims on behalf of the Delaware Indian people. Such Business Committees and the members thereof have lobbied Congress to enact the legislation mentioned herein by which they have excluded or attempted to exclude parties whom they have represented from the benefits due to them under the actions taken. The Secretary of the Interior has at all times known of the breach of fiduciary relationship involved and has and will, unless enjoined by this Court, make or cause to be made distributions of funds in such manner as to deprive the Plaintiff and the class she represents of their constitutional rights.

23. The attempt by the United States to make arbitrary classification of Delaware Indians for the purpose of distributing benefits of judgments entered under actions taken on behalf of all Delaware Indians under the Indian Claims Commission Act denies equal protection of the laws and thus deprives the Plaintiff and the class represented by her of due process of law in violation of the Fifth Amendment to the Constitution of the United States. Public Law 92-456 attempts to benefit only those Delaware Indians whose names or their ancestors' names appear on the Cherokee Delaware census rolls of 1906 and the Absentee Delaware census rolls of 1940, to the exclusion of the Kansas Delawares whose land was misappropriated

and unlawfully sold by the United States in 1858 in breach of the Treaty of 1854, which breaches of treaty obligations were the bases for the entering of the judgments in which they seek to participate. Public Law 92-456 (25 U.S.C. §§ 1291-1297) is unconstitutional and void unless it is construed to permit the Secretary of the Interior to determine the members of the Delaware Indian peoples who are entitled to benefits in the judgment in Docket Nos. 72 and 298 without discrimination on any basis that is not arbitrary and discriminatory.

24. The funds duly appropriated by the Congress of the United States to pay the judgments in Docket Nos. 337, 72 and 298 will be unlawfully distributed in deprivation of the constitutional and property rights of the Plaintiff and the members of the Kansas Delawares unless this Court enters a restraining order pending the hearing of the right for a preliminary injunction and the Plaintiff and the class she represents will suffer irreparable harm. Upon hearing, the Court should enter a preliminary injunction against such distribution pending a hearing of the merits of this cause.

WHEREFORE, THE PLAINTIFF PRAYS:

1. That a Restraining Order and Preliminary Injunction issue against all Defendants from distributing any funds or receiving any funds appropriated by the Congress for the payment of the judgments entered in Indian Claims Commission Dockets Nos. 72 and 298 and any funds remaining undistributed to pay the judgment entered in Docket No. 337 until the cause alleged herein is determined.

2. That the Court either construe Public Law 92-456 as permitting and directing the Secretary of the Interior to provide a manner of distribution of the funds appropriated to pay the herein mentioned in judgment without unlawful discrimination between persons entitled to share in the proceeds of such judgment or, in the alternative, that if

such law cannot be properly so construed, that such law be declared unconstitutional and void. In such latter case, the Court should order the Secretary of the Interior to hold such funds pending the enactment of legislation to provide for a legal and proper distribution thereof and the establishment of due process for the purposes of allowing the Delaware Indians entitled to share in such judgment to make due claim therefor.

3. The Court should restrain and enjoin the Absentee Delaware Tribe of Oklahoma Business Committee and the members thereof and the Delaware Tribal Business Committee and the members thereof from representing in any forum or in any hearings before any governmental bodies or agencies the several rights of the Delaware Indians comprising the Delaware Nation of Indians or from in any other manner breaching their fiduciary duties to represent all Delaware Indians without discrimination.

4. Determining any entitlement to counsel fees and costs within the jurisdiction of this Court in relation to this matter.

5. For such other relief as is just and equitable.

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

Answer

(Filed December 17, 1973)

COMES Now the defendants, United States of America; Rogers C. B. Morton, Secretary of the Interior of the United States of America; Delaware Tribe of Western Oklahoma, designated by Plaintiff in the Complaint as The Absentee Delaware Tribe of Oklahoma Business Committee; Clio Church, Mabel Murray, and Grace Spooner Rose, by their attorneys, William R. Burkett, United States Attorney for the Western District of Oklahoma and Givens L. Adams, Assistant United States Attorney, and for their answer to the complaint of the plaintiff, deny generally and specifically each and every allegation therein contained, except such as may be hereinafter specifically admitted.

For further answer and defense, defendants allege and state:

1. Paragraph One (1) is admitted.

2. The allegations of paragraph Two (2) are denied for the reason that said defendants have insufficient knowledge to admit or deny same.

3. Paragraph Three (3) is denied except that while sometimes referred to as The Absentee Delaware Tribe, its official name is the Delaware Tribe of Western Oklahoma, and its governing body is designated the Executive Committee rather than Business Committee.

4. It is expressly denied that the persons named in paragraph Four (4) are Delaware Indians. The defendants

lack sufficient information to admit or deny whether defendants Clio Church, Mabel Murray and Grace Spooner have the authority to act for persons of Delaware descent.

5. Defendants lack sufficient information to admit or deny the allegations of paragraph Five (5) of plaintiff's complaint.

6. Paragraph Six (6) is denied for the reason that the sub-classes listed by the plaintiff are not so specific that said defendants can admit that all persons within them meet the conditions specified by the plaintiff in this paragraph.

7. Paragraph Seven (7) is denied.

8. The second and third sentences of paragraph Eight (8) are admitted. The fourth sentence of paragraph Eight (8) is admitted to the extent that the Kansas Delawares did elect to move to Indian Territory and join the Cherokee Nation. It is also admitted that the Absentee Delawares were moved from Kansas and voluntarily joined with the Caddo Indians in Indian Territory. All other allegations in paragraph Eight (8) are denied.

9. Paragraph Nine (9) is denied for the reason that said defendants have insufficient knowledge to admit or deny same.

10. Paragraph Ten (10) constitutes conclusions of law which said defendants cannot admit or deny.

11. The allegations in paragraph Eleven (11) are denied. The said defendants are informed and therefore allege that the share of each participant in the judgment fund will not exceed $10,000.00.

12. The allegations in paragraph Twelve (12) are a conclusion of law which said defendants cannot answer and are therefore denied.

13. Paragraph Thirteen (13) is admitted.

14. The allegations in paragraph Fourteen (14) are conclusions of law and the said defendants cannot admit or deny the same.

15. The allegations in paragraph Fifteen (15) are admitted.

16. The allegations in paragraph Sixteen (16) are denied. The said defendants are informed and therfore allege that the award in Docket No.'s 72 and 298 pursuant to the provisions of the Treaty of 1854 with the Delawares was for $9,168,171.63.

17. Paragraph Seventeen (17) is denied.

18. The allegations of paragraph Eighteen (18) are admitted.

19. It is admitted that PL 92-456 limits payment of the tribal judgment in Docket No.'s 72 and 298 to persons who meet the requirements set forth in 25 U.S.C. § 1292. All other allegations of the paragraph numbered Nineteen (19) are denied.

20. The allegations in paragraph Twenty (20) are denied for the reason that it is Congress rather than any Indian Claims Commission which determines whether and, if so, how a tribal judgment fund shall be used or distributed.

21. The allegations contained in sentences 1, 2, 3, 6, 7, 8, 9 and 12 of Paragraph Twenty-one (21) are admitted, except it is denied that all members of each sub-class duly filed claims with the Secretary of the Interior. It is also admitted that the plaintiff has exhausted her administrative remedies but it is expressly denied that all members of the alleged sub-classes have exhausted their administrative remedies. The allegations in sentences 4, 5, 10 and 11 are conclusions of law which defendants cannot answer and they are therefore denied.

22. Paragraph Twenty-two (22) is denied.

23. It is admitted that PL 92-456 provides for the distribution of judgment funds awarded in Docket No.'s 72 and 298 as provided in 25 U.S.C. § 1292. All other allegations in paragraph Twenty-three (23) are denied.

24. The allegations in paragraph Twenty-four (24) are conclusions of law which we cannot answer and are therefore denied.

WILLIAM R. BURKETT
United States Attorney

/s/ GIVENS L. ADAMS
Givens L. Adams
Assistant United States Attorney

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

(Title omitted in printing)

Amendment To Complaint

(Filed January 25, 1974)

The Plaintiff amends her Complaint in this action as follows:

1. Plaintiff deletes from her Complaint all allegations that the defendants, Murray, Church and Rose, and the class of which they are a part, are claiming to be members, or are members, of the Delaware Nation entitled to share in the proceeds of the judgments in Indian Claims Commission Dockets #337, #72 and #298.

2. When this action was filed there was pending in the United States District Court for the District of Kansas Civil Action No. KC-3696 wherein the defendants, Murray, Church and Rose, were claiming that they and other members of a group of Indians referred to as the Munsees were historically a part of the Delaware Nation and were persons entitled to be included in the benefits of the judgments in Indian Claims Commission Dockets #337, #72 and #298. The Court had entered a temporary restraining order against Rogers C. B. Morton, Secretary of the Interior, restraining him and his agents from distributing the remaining judgment funds for such docket numbers until the Plaintiffs' Complaint for a preliminary and permanent injunctive relief could be heard and determined. On August 16, 1973, such Court entered a subsequent Temporary Restraining Order granting injunctive relief pending hearing of the cause. This order is now and was in force and effect on the date this action was filed. A copy of such order is attached hereto as Exhibit "A."

3. On January 10, 1974, the defendants, Murray, Church and Rose, reported to the Three-Judge Court appointed to hear case No. Civil KC-3696 in Kansas that previously undiscovered historical documents had been uncovered which conclusively showed that the group of Indians called the Munsees had severed all relationships with the Delaware Nation of Indians in 1826 and did not thereafter have any continuing political, cultural or economic ties with the Delaware Nation; that at the times of the wrongs which were the bases for the judgments in Dockets #337, #72 and #298 the Munsee Indians were not a part of the Delaware Nation and admitted that the Munsee Indians were not entitled to share in the benefits of the judgments. A Motion To Dismiss, based upon such newly discovered evidence, was filed and is now under advisement pending a determination as to whether the Kansas action is a class action and whether notification must be given to other members of the class in order for the Court to be able to dismiss the cause.

4. The Plaintiff in this action has no knowledge of any other persons of the Munsee Class of Delaware Indians who make any claim that such class is entitled to share in the benefits of the judgments in Dockets #337, #72 and #298 and, therefore, amends her Complaint accordingly.

5. Upon the dismissal of said case No. Civil KC-3696, the Temporary Restraining Order, Exhibit "A", will be dissolved. The Plaintiff believes, and so alleges, that upon the dissolution of such restraining order the funds will be released and will be paid to persons not entitled thereto to the prejudice of the Plaintiff and the class of which she is a representative.

6. The Delaware Nation of Indians and the Cherokee Nation of Indians entered into an agreement on the 8th day of April, 1867, wherein it was agreed that the Cherokee Nation would accept as citizens those members of the Delaware Tribe of Indians who desired to move from Kansas to the Cherokee Nation lands pursuant to the Treaty of 1866 with the United States. The terms and payments as conditions to such admission to citizenship to the Cherokee Nation were set out in such agreement and were met by all parties. Among other benefits as citizens of the Cherokee Nation, the entering Delaware Indians were each entitled to and did receive 160 acres of land in the Cherokee Nation for life. Such land was not granted to such Delaware Indians in fee and their children received no interest therein by inheritance. The said agreement expressly provided that the children of such entering Delawares "shall in all respects be regarded as native Cherokees." As such native Cherokee Indians, such children were citizens of the Cherokee Nation, entitled to all of the benefits as such citizens, and were never Delaware Indians. The said agreement was approved by the President of the United States.

7. The Constitution of the Delaware Nation was amended to incorporate the provisions of the agreement between the Delaware Nation and the Cherokee Nation, and all conditions of such agreement were met, including payments from the Delaware Tribal Fund to the Cherokee Nation for the benefit of the Delaware Indians who joined the Cherokee Nation.

8. At the time of the entry of the judgments in said Dockets #337, #72 and #298, all of the Kansas Delawares who entered the Cherokee Nation as citizens pursuant to the agreement of 1867 were deceased. The present class designated Cherokee Delawares contains only persons and their descendants who were by such agreement native Cherokee Indians and are not Delaware Indians, and the Plaintiff believes, and so alleges, that such persons have received all of the benefits of other Cherokee Indians, including allotments of Cherokee Nation lands upon the dissolution of such Nation. Such Cherokee Delawares were never members of the Delaware Nation and are not persons

entitled to benefits of the judgments in said Dockets #337, #72 and #298. Their ancestors were Delaware Indians who were residents on the tribal lands in Kansas when the United States illegally and improperly sold such lands pursuant to the Treaty of 1854, but such ancestors, by virtue of the agreement of 1867, agreed that their children would not thereafter be Delaware Indians.

9. The census roll of 1906, designated by Congress in Public Law 92-456 (25 U.S.C. § 1291-1297) as the basis for payment of funds from said Dockets # 72 and # 298, did not purport to be and was not a roll of persons then members of the Delaware Nation, but related only to members of the Delaware Indian tribe who removed to the Cherokee Nation pursuant to the agreement of 1867 and their children. Such roll included persons who were never Delaware Indians but who were native Cherokee Indians and, as such, were not persons entitled to the benefits of the judgments in Dockets #337, #72 and #298.

10. Some payments have heretofore been made from the funds appropriated pursuant to Public Law 90-508 (25 U.S.C. § 1181-86), which law was, the Plaintiff asserts, unconstitutional. Such payments were made to Kansas Delawares, Absentee Delawares and Cherokee Delawares, and to the extent thereof the Plaintiff is without an adequate remedy. There remains undistributed approximately $500,000.00 which has been retained by the Secretary of the Interior pending litigation of the rights of the parties. The Plaintiff alleges that the Cherokee Delawares are not entitled to any share of the remainder of the funds from Docket #337, nor to any of the funds from Dockets #72 and #298. The claim of the Absentee Delawares, as set out in the Complaint, is disputed by the Plaintiff. Therefore, none of the funds can be paid out until a determination of the issues between the parties without irreparable harm.

WHEREFORE, the Plaintiff prays for a hearing on her application for a preliminary injunction and renews the prayer of her Complaint.

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Attorneys for Plaintiff

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(Title omitted in printing)

Verified Motion of Plaintiff Wanda June Weeks for Order Directing That This Action Proceed as a Class Action

(Filed February 11, 1974)

Plaintiff Wanda June Weeks respectfully states:

I.

FACTS UNDER RULE 23(a).

1. FACTS UNDER RULE 23(a)(1). KANSAS DELAWARE CLASS: Plaintiff is a member and representative of the class of persons designated for convenience in the complaint as "Kansas Delawares". The Kansas Delaware class is composed solely of the lineal descendants of those persons who were entitled to and did, pursuant to Article 3 of the Treaty of July 4, 1866, elect to remain in Kansas, rather than emigrate to what is now eastern Oklahoma. A roll (herein referred to as "Pratt Roll") of these Delawares who so elected to remain in Kansas was contemporaneously prepared by John G. Pratt, U.S. Indian Agent for the Delaware Tribe of Indians. The class "Kansas Delaware" consists of the descendants of the persons named on the Pratt Roll. The Pratt Roll listed the following persons:

(1) Mary Jane Defries	
Minor Children:	William A. Defries
	Anna E. Defries
(2) Frances C. Grinter	
Minor Children:	Mary E. Grinter
	John W. Grinter
	Nannie Grinter
	Edward E. Grinter

(3) Annie Grinter	
Minor Children:	Martha Grinter
	Cunningham Grinter
(4) William Henry Grinter	
(5) Rosanna Grinter	
Minor Children:	Juliet Grinter
	Henrietta Grinter
	Maria Jane Grinter
	Sarah Frances Grinter
	Mary Bell Grinter
	James M. Grinter
	Elizabeth S. Grinter
	Flora Grinter
(6) Sally Honeywell	
Minor Children:	Eli M. Honeywell
	Susan T. Honeywell
	William Honeywell
	John Honeywell
(7) George O. Collins	
Minor Child:	Ida M. Collins
(8) Lewis Ketchum	
(9) Elizabeth Z. Ketchum	
Minor Children:	Mary L. Ketchum
	Jane Ketchum
	Barbara Ketchum
	Simon Ketchum
	Silas Ketchum
	Lucinda Ketchum
	Sollomon Ketchum
(10) John W. Ketchum	
(11) Mary E. Ketchum	
(12) Sarah A. Ketchum	

(13) Ellen Swisher
Minor Children: Mary P. Swisher
James Henry Swisher
John S. Swisher
Rosalie Swisher

(14) Melinda Wilcoxen
Minor Children: Lucinda Wilcoxen
Emmett Wilcoxen

(15) Betsey Zeigler
Minor Child: Charles Zeigler

(16) Logan Zeigler

(17) Sophia Zeigler
Minor Children: John Zeigler
Emily Zeigler

(18) George Zeigler
Minor Child: Racheal Zeigler

(19) Mary Tiblow Stevenson
Minor Child: Rosana Stevenson

(20) Mary Ann Tiblow
Minor Children: Virginia Tiblow
Francis Tiblow
Richard W. Tiblow
Charles Tiblow
Nancy Jane Tiblow

(21) Nannie M. Pratt
Minor Children: Laronia Pratt
Ella May Pratt
Ida Pratt

Plaintiff's class (Kansas Delaware) consists exclusively of the lineal descendants of the above-named individuals. There are more than three hundred descendants of Annie Grinter alone. Although Annie Grinter was relatively prolific (she had 12 children), there are probably approximately one thousand members of the Kansas Delaware

class. The Kansas Delaware class is therefore so numerous that joinder of all members is impracticable.

CHEROKEE DELAWARE CLASS: Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott represent the class of persons designated for convenience in the complaint as "Cherokee Delawares." The Cherokee Delaware class is composed solely of the lineal descendants of those persons who, pursuant to Article 4 of the Treaty of July 4, 1866, emigrated to what is now eastern Oklahoma. There are approximately 6,500 members of the Cherokee Delaware class. The Cherokee Delaware class is therefore so numerous that joinder of all members is impracticable.

ABSENTEE DELAWARE CLASS: Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake, and Charles Taylor are members of and represent the class of persons designated for convenience in the complaint as "Absentee Delawares." The Absentee Delaware class is composed entirely or almost entirely of the lineal descendants of the Delawares who split off from the main body of the Delaware people and joined with the Caddo Indians rather than migrating to Kansas with the main body of the Delaware people in the early 1830's. According to S. Rep. No. 1518, 90th Cong., 2d Session (1968) p. 12 and H. Rep. No. 1555, 90th Cong., 2d Session (1968), the Absentee Delaware class consists of approximately 750 to 800 persons. Other materials, most notably Volume I, Number I of the Delaware Newsletter, dated September 21, 1972, indicate that there are as many as 1,500 Absentee Delawares. The Absentee Delaware class is therefore so numerous that joinder of all members is impracticable.

MUNSEE DELAWARE CLASS: The complaint has been amended to eliminate the Munsee Delaware class from this section.

2. Facts Under Rule 23(a)(2). Common Questions of Law: The respective classes are at issue with one another on the question of the constitutionality of 25 U.S.C. §§ 1181-86 and 25 U.S.C. §§ 1291-97. These questions of law are common to each of the classes. A second common question of law is the issue of whether the Cherokee Delaware and Absentee Delaware classes have any entitlement at all to share in the judgment funds in question.

Common Questions of Fact: The respective classes are so defined that the facts material to the legal issues raised by the pleadings are common to all members within each class. Thus, the factual issues exist between the classes and not within the classes. The main factual controversy is raised by the failure by the Defendants to admit paragraphs six through nine of the complaint.

3. Facts Under Rule 23(a)(3). Claims of Plaintiff Wanda June Weeks as Member and Representative of Kansas Delaware Class. The claims of Plaintiff are based on the fact that she is a lineal descendant of a Delaware who elected to remain in Kansas, as shown by the Pratt Roll. Plaintiff asserts no rights that do not inure to her by virtue of being a lineal descendant of a Delaware whose name appears on the Pratt Roll. By representing the Kansas Delaware class as defined herein, she seeks to represent only those whose rights are similarly grounded.

Defenses of Defendants Townsend, Young, Crow, Secondine and Scott as Members of Cherokee Delaware Class: The above-named Defendants filed their Answer on November 16, 1973. Nothing in their Answer indicates that there are any dissimilar or inconsistent factual or legal defenses within the Cherokee Delaware class.

Defenses of Defendants Thomas, Martinez, M. Holder, T. Holder, Snake and Taylor as Members of Absentee Delaware Class: The above-named Defendants filed their Answer on December 17, 1973. Nothing in their Answer

indicates that there are any dissimilar or inconsistent factual or legal defenses within the Absentee Delaware class.

4. Facts Under Rule 23(a)(4). Plaintiff Wanda June Weeks: Plaintiff Weeks has been active among descendants of Annie Grinter for all of her adult life. She has of her own volition become knowledgeable as to the history of the Grinter family and of the Kansas Delawares in general. The Grinter family is a large segment of the Kansas Delaware class. As to all of the Indian Claims Commission judgments here in issue, it has been Plaintiff Weeks who has taken the lead in applying for participation and asserting her rights and the rights of those similarly situated. Plaintiff's efforts on behalf of herself and others similarly situated have included considerable historical research, both locally and in Washington, D.C. In addition, Plaintiff has engaged in correspondence and personal face to face discussions as to Kansas Delaware rights with numerous public officials. Consequently, Plaintiff has been looked to by Grinter descendants and by others in the Kansas Delaware class as being a person willing and able to see that the rights of the Kansas Delaware class are protected. The attorneys Plaintiff has selected will stand on their reputation as to their ability to properly represent Plaintiff's class.

Defendants Townsend, Young, Crow, Secondine and Scott: Each of the individually named "Cherokee Delaware" defendants has been active in promoting the interests of those in the "Cherokee Delaware" class. These persons are the elected representatives of the persons comprising the "Cherokee Delaware" class. Defendant Townsend is and has been a forceful and knowledgeable advocate of the rights of the class he represents.

Defendants Thomas, Martinez, M. Holder, T. Holder, Snake and Taylor: Each of the individually named Absentee Delaware defendants has been active in promoting

the interest of those in the Absentee Delaware class. They all have held office on the Executive Committee of the Delaware Tribe of Western Oklahoma (Absentee Delaware Tribe), and are ably represented by the Department of Justice.

II.

FACTS UNDER RULE 23(b).

This action is sought to be maintained as a class action under the provisions of Rule 23(b)(1) and (b)(2).

1. FACTS UNDER RULE 23(b)(1). Each class involved in this action is composed of many members, living in several judicial districts. The members of the Cherokee Delaware class reside largely in the Northern and Eastern Districts of Oklahoma. The members of the Absentee Delaware class reside largely in the Western District of Oklahoma. Since this action concerns rights in two common funds, there is, unless the class action device is employed, a risk of inconsistent or varying adjudication with respect to individuals in each class which would establish incompatible standards of conduct for the federal defendants. Also, since this action does involve two common funds, with the members of the respective classes sharing common factual backgrounds, adjudication with respect to individual members of each class would as a practical matter be dispositive of the interest of the other members.

2. FACTS UNDER RULE 23(b)(2). The Defendant Morton has refused to disburse judgment funds in Indian Claims Commission Docket Nos. 72 and 298 to the members of the Kansas Delaware class. In addition, the Defendant Morton is threatening to disburse a portion of the remaining funds in Indian Claims Commission Docket No. 337 to the members of the Cherokee Delaware and Absentee Delaware classes, in violation of the rights of the Plaintiff and the class she represents, as set forth in the Complaint

and in the amendment thereto. Defendant Morton has taken this action under color of 25 U.S.C. §§ 1181-86 and 1291-97. In the case of the judgment funds in Indian Claims Commission Docket Nos. 72 and 298, the Defendant Morton has refused to act on grounds generally applicable to Plaintiff's class, that ground being that his refusal to allow Plaintiff's class to participate in the judgment funds is mandated by 25 U.S.C. §§ 1291-97.

WHEREFORE, Plaintiff Wanda June Weeks respectfully submits this motion and the accompanying brief and prays that this Court enter its order directing that this action proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure and that the classes be determined, defined and represented as set forth above.

/s/ Stephen P. Friot
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(Verification and Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

(Title omitted in printing)

(Filed March 13, 1974)

Pre Trial Order

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, this cause was set down for pre-trial conference on February 28, 1974. The pre-trial conference was commenced on February 28, 1974 and completed on March 5, 1974. The following action was taken:

1. *Appearances.* Plaintiff Wanda June Weeks appeared at both sessions by her counsel of record, Delmer L. Stagner and Stephen P. Friot. In addition, Mr. Stagner announced that Henry B. Taliaferro, Esquire, of Casey, Lane and Mittendorf, 815 Connecticut Avenue, N.W., Washington, D.C. 20006 had become associated as co-counsel for Plaintiff. The Defendants United States of America, Rogers C. B. Morton, Delaware Tribe of Western Oklahoma (designated in the complaint as the Absentee Delaware Tribe of Oklahoma Business Committee), Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor appeared at both sessions by William R. Burkett, United States Attorney, Givens L. Adams, Assistant United States Attorney, and by Duard R. Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior. In addition, Mr. Snake appeared personally at the second session. The Defendants Delaware Tribal Business Committee, Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott appeared at the first session by their counsel of record Bruce Miller Townsend and Clyde J. Watts and at the second session by Mr. Townsend, Mr. Watts having been absent with

leave of the Court. In addition, Mr. Secondine appeared personally at the second session. No appearance was made for the Defendants Clio Church, Mabel Murray and Grace Spooner Rose, they and their purported class having been excluded from this action by virtue of the Amendment to Complaint filed on January 25, 1974. The Court dismissed this action as to Defendants Church, Murray and Rose and ordered the names of their counsel, Malcolm Wheeler and Louise Wheeler, stricken as counsel of record herein.

2. *Jurisdiction.* All Defendants deny that this Court has jurisdiction of this action. Plaintiff asserts that this court has jurisdiction of this action under 28 U.S.C. § 1331(a); 28 U.S.C. § 1361; and the review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. Plaintiff withdrew her assertion of jurisdiction under 28 U.S.C. § 1362.

3. *Nature of the Case.* This is an action in which the Plaintiff seeks to represent the "Kansas Delaware" class, as defined in the Complaint, in their claim to be entitled to receive all of the funds appropriated by Congress for per capita distribution in satisfaction of the judgments against the United States in Indian Claims Commission Docket Nos. 72 and 298, to the exclusion of groups designated for convenience and brevity as the "Cherokee Delaware" class, and the "Absentee Delaware" class. As to the funds appropriated by Congress for per capita distribution in satisfaction of the judgments in Indian Claims Commission Docket No. 337, Plaintiff claims that her class and the "Absentee Delaware" class are entitled to participate, to the exclusion of the "Cherokee Delaware" class. Secondarily, Plaintiff claims that even if one or both of the opposing classes be found to be entitled to share in the judgment funds in Docket Nos. 72 and 298, the members of the "Kansas Delaware" class which she seeks to represent are entitled to share per capita on an equal basis with the members of such opposing class or classes. All parties

who are members of the "Cherokee Delaware" class deny that Plaintiff or the class she seeks to represent have any entitlement to share in any of the judgment funds in question and, in addition, counsel for said parties has stated his intent to file a counter claim against those of the "Kansas Delaware" class who have received payments under Docket No. 337 and a cross claim against the federal Defendants, asserting that the payments under Docket No. 337 were improperly paid to and received by those members of the "Kansas Delaware" class who did receive such payments. The federal Defendants and those Defendants who are members of the "Absentee Delaware" class admit that those members of the "Kansas Delaware" class who duly applied and whose applications were approved are entitled to share in the funds appropriated to satisfy the judgment in Docket No. 337, but deny that Plaintiff or any members of the class she seeks to represent are entitled to share in the funds appropriated to satisfy the judgment in Dockets 72 and 298.

4. *Contentions of the Parties.* The contentions of the Plaintiff have been set forth in her Pre-Trial Statement filed herein on February 28, 1974. In addition, Plaintiff announced that further documentary materials would be offered either by way of a supplement to her Pre-Trial Statement or on her motion for summary judgment or at trial. The Defendants' contentions are set forth in their answers and briefs herein and will be further set forth in their motions to dismiss or for summary judgment, or at trial.

5. *Relief Asked.* Plaintiff seeks a preliminary and permanent injunction against the federal Defendants, enjoining said Defendants from enforcing 25 U.S.C. §§ 1181-1186 (Public Law 90-508) and 25 U.S.C. §§ 1291-1297 (Public Law 92-456), on the ground that said statutes are unconstitutional on their face. In addition, Plaintiff seeks a mandatory injunction in the nature of a writ of mandamus, to re-

quire the Secretary of the Interior to pay the judgment funds in question to Plaintiff and her class. Plaintiff further asserts that should she prevail herein, and should this action be certified as a class action as to the "Kansas Delaware" class, then, in addition to granting permanent injunctive relief against the said Secretary of the Interior, it will be necessary for the Court to establish a procedure by which claims can be made and submitted by the members of the "Kansas Delaware" class.

6. *Discovery.* All parties indicated a need for further discovery. To expedite this matter, the Court ordered and hereby orders that responses to all Interrogatories, Requests for Admissions and Requests for Production of Documents shall be made within two weeks from service of the Interrogatories or Requests; provided, however, that where response to any individual Interrogatories or Requests proves to be extraordinarily time consuming, the Court may, upon request, extend the time for response as to such individual Interrogatories or Requests.

7. *Motions.* The Defendants are given ten days from March 5, 1974, within which to file motions to dismiss, with supporting briefs; the Plaintiff shall have ten days from the date of service of said motion or motions within which to file her Answer Brief; and the movants shall have five days from the date of service of Plaintiff's Answer Brief within which to file their Reply Briefs. The parties indicated their hope and belief that this action can be determined on the merits on cross motions for summary judgment and, in that regard, the parties are encouraged to file said motions without delay.

8. *Exhibits.* Plaintiff tendered to the Court and to counsel all the exhibits contained in her Pre-Trial Statement, and, in addition, announced that she would have further documentary evidence. The Defendants tendered no exhibits. If this action should proceed to an evidentiary hearing, the parties shall, ten days prior to trial, exchange

originals or copies of all documentary evidence not previously furnished to counsel which they intend to offer at trial.

9. *Witnesses.* The Plaintiff listed the following witnesses:

1. Wanda June Weeks, 1909 Alladin, Norman, Oklahoma 73069
2. Mary Jane Grinter, 2318 S.W. 20th, Oklahoma City, Oklahoma 73108
3. Katherine Elizabeth Ware, 3225 S.W. 37th, Oklahoma City, Oklahoma 73119
4. Dennis E. Stock, 3225 S.W. 37th, Oklahoma City, Oklahoma 73119
5. Lewis A. Sigler, General Counsel, Committee on Interior and Insular Affairs, 1324 Longworth House Office Building, Washington, DC 20515
6. John E. Lynn, Administrative Assistant to Representative James R. Jones, 327 Cannon House Office Building, Washington, DC 20515
7. Lee Paden, Administrative Assistant to Senator Henry Bellmon, Senate Office Building, Washington, DC 20515
8. Ed Edmondson, Court at Fifth Street, Muskogee, Oklahoma 74401
9. Bruce Miller Townsend, 711 Thurston National Building, Tulsa, Oklahoma 74103 (adverse witness)
10. Lawrence Snake, 401 E. Steed Drive, Midwest City, Oklahoma 73110 (adverse witness)
11. Duard Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior, Office of the Solicitor, Washington, DC 20240 (adverse witness)
12. Louis L. Rochmes, 1300 Connecticut Avenue, N.W., Washington, DC 20006 (adverse witness)

The names of all witnesses, other than witnesses whose testimony will be introduced by trial deposition, will be furnished to opposing counsel at least ten days prior to trial. This requirement shall not apply to rebuttal witnesses, the necessity of whose testimony cannot be anticipated before the time of trial.

10. *Class Action.* Plaintiff is directed to prepare and submit to the Court a proposed order certifying this action as a class action.

Dated: March 5, 1974.

/s/ Luther B. Eubanks
LUTHER B. EUBANKS, *United States District Judge*

O.K.:

/s/ Delmer L. Stagner
DELMER L. STAGNER and STEPHEN P. FRIOT, *Attorneys for Plaintiff.*

/s/ Givens L. Adams
GIVENS L. ADAMS, *Attorney for Defendants as set forth in Paragraph 1 hereof.*

/s/ C. J. Watts
CLYDE J. WATTS, *Attorney for Defendants as set for in Paragraph 1 hereof.*

/s/ Bruce Miller Townsend
BRUCE MILLER TOWNSEND, *Attorney for Defendants as set forth in Paragraph 1 hereof.*

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

(Filed November 1, 1974)

Order

Upon consideration of pending motions in these consolidated actions, and the arguments and briefs submitted thereon, it is ORDERED that:

The pending motion to dismiss filed by the defendant United States in No. Civ. 73-586-E, Western District of Oklahoma, entitled Weeks v. United States, et al, is sustained, the action as against the Government being an unconsented suit not within the jurisdiction of the court. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141-42; United States v. Sherwood, 312 U.S. 584; see Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687. The pending motions to dismiss in both of the above entitled actions filed by defendant Morton and all defendants other than the United States are denied.

The pending motion of plaintiff for summary judgment and the motion for partial summary judgment by defendant Delaware Tribal Business Committee and defendants other than the United States and defendant Morton, both pending in No. 73-586-E, Western District of Oklahoma, entitled Wanda June Weeks v. United States, et al, are overruled, it being the view of the Court that there may be genuine issues as to some material facts and that summary judgment procedures in said action are inappropriate.

The plaintiff Weeks in No. 73-586-E, Western District of Oklahoma has moved that said action proceed as a class action on behalf of the Kansas Delawares. In No. 73-C-311, Northern District of Oklahoma, now transferred to

this district and consolidated with No. 73-586-E, the complaint requests that the action proceed also on behalf of the Kansas Delawares. In addition the motion of plaintiff Weeks in No. 73-586-E, requests that said action proceed against specified defendants as representatives of the Cherokee Delawares and the Absentee Delawares, respectively.

Pursuant to Rule 23(a), F.R.Civ.P., the court finds that the plaintiff class consisting of the Kansas Delawares, and the defendant classes consisting of the Cherokee Delawares and the Absentee Delawares are so numerous that joinder of all members thereof is impracticable; that there are questions of law or fact common to each class relating to the rights of said class in regard to the claim of unconstitutionality under 25 U.S.C.A. § 1291 and related statutes; that the claims of the representative parties plaintiff and defendant are typical of the claims of their respective classes whose alleged rights are involved herein; and that the representative parties plaintiff and defendant will fairly and adequately protect the interests of the respective classes.

The court further finds that this action may proceed as a class action on behalf of the plaintiff class and against the defendant classes both pursuant to Rule 23(b)(1)(B) and Rule 23(b)(2), since adjudication with respect to the individual members of the classes would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and since the defendant Morton and the several classes have acted on grounds generally applicable to said classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole. See Cranston v. Freeman, 290 F.Supp 785 (N.D. N.Y.), rev'd on other grounds *sub nom.* Cranston v. Hardin, 428 F.2d 822 (2d Cir.), cert. denied, 401 U.S. 949; Rod-

riguez v. Swank, 318 F.Supp. 289, 293-295 (N.D.Ill.), aff'd., 403 U.S. 901.

Pursuant to Rule 23(d), F.R.Civ.P., the court ORDERS that there be individual notice by certified mail to all members of the Kansas Delaware class who can be identified through reasonable effort, said notice to be mailed within 30 days hereafter, advising each member that these suits are being maintained as class actions for all Kansas Delawares and describing the nature of the suits; that the judgment, whether favorable or not to him or her, will be binding on all members of said Kansas Delaware class; and that any member may, if he or she desires, enter his or her separate appearance, on his or her own behalf or through counsel, within 45 days after the date of this order.

The court having granted the motions for class actions on behalf of the plaintiff Kansas Delawares in both of the above entitled cases, it is directed that the plaintiffs, by counsel, in both actions confer promptly with a view to agreement upon arrangements and procedures for notice and all other matters necessary for maintenance of these suits as class actions for the plaintiff Kansas Delawares. If there be any dispute concerning the same, the parties are directed to apply to the Honorable Fred Daugherty, Chief Judge of this district, for any necessary orders prescribing responsibilities as between the parties and counsel in connection with class action procedures. Such application to the Chief Judge should be made within 15 days from the date hereof.

As to the defendant classes of the Cherokee Delawares and the Absentee Delawares, in its discretion under 23(d), F.R.Civ.P., the court determines that personal notice to all members of said defendant classes is not necessary. Unlike the Kansas Delawares who have not had designated representatives and regular communications from them, it appears that the Cherokee Delawares and the Absentee

Delawares have been represented by the parties named as defendants in No. 73-586-E, entitled Weeks v. United States, et al. It is, therefore, ORDERED that notice to the defendant classes, the Cherokee Delawares and the Absentee Delawares, be given within 30 days hereof by publication in a tribal business letter or paper, or in a newspaper of general circulation in the city or town designated by the defendant representatives of said classes as having the most circulation to the members thereof. Said notice shall contain the same notifications and provisions for optional separate appearances, by such persons themselves or through counsel, as are provided hereinabove in the notice to members of the Kansas Delaware class.

It is directed that the plaintiffs, by, counsel, and the defendant representatives of the Cherokee Delawares and the Absentee Delawares, by counsel, also confer promptly with a view to agreement on an arrangement of procedures for such notice. If there be any dispute concerning the same, the parties are directed to apply to the Honorable Fred Daugherty, Chief Judge of this district, for any necessary order. Such application should be made within 15 days from the date hereof.

The court, having disposed of pending motions and applications preliminary to a final hearing on the merits, advises the parties that at an early date after completion of said notices and expiration of the time for additional appearances, the court will hold a hearing on the merits of these actions on all disputed issues of fact, including the constitutional issue as to whether there is a rational basis under constitutional standards for the provisions of 25 U.S.C.A. § 1291 and the statutes related thereto, excluding the Kansas Delawares from participation in the distribution of the judgment funds in dispute in these cases, on which issue, among others, the court will receive all competent proof for final determination on the merits, and final arguments on the merits.

DATED THIS 1st day of November, 1974.

/s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

/s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District of Oklahoma

/s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

Amendment To Order

(Filed November 4, 1974)

On its own motion the court hereby amends its order entered November 1, 1974, in these consolidated actions to provide further as follows:

It is further ORDERED that the cost of notice by certified mail to the plaintiff class of the Kansas Delawares and the cost of notice by publication to the defendant Cherokee Delawares class and the defendant Absentee Delaware class shall be borne by the plaintiff. Cf. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804. Prior to such notice by certified mail and publication, the proposed form of such notice and the proposed manner of publication shall be submitted to the Honorable Fred Daugherty, Chief Judge of the Western District of Oklahoma, for approval after service of a copy thereof on opposing counsel, together with notice stating when the same shall be presented to Chief Judge Daugherty.

DATED this 4th day of November, 1974.

/s/ William J. Holloway, Jr.
WILLIAM J. HOLLOWAY, JR.
United States Circuit Judge

/s/ Fred Daugherty
FRED DAUGHERTY
Chief Judge, Western District of Oklahoma

/s/ Luther B. Eubanks
LUTHER B. EUBANKS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

Order Approving Forms of Class Action Notice and Procedures For Giving Notice

(Filed November 18, 1974)

This matter comes on to be heard this 18th day of November, 1974, for the purpose of entry of an Order approving form of class action notice, approving the definitions of the respective classes, and approving procedures for giving said notice, the parties being present by counsel. The Court, having examined the suggested forms of notice to the respective classes herein, having heard the arguments of counsel and being fully advised,

IT IS ORDERED THAT the class action notice to the members of the Kansas Delaware class shall be given in the form attached hereto as Exhibit "A."

IT IS FURTHER ORDERED THAT the class action notice to the members of the Cherokee Delaware class shall be in the form attached hereto as Exhibit "B."

IT IS FURTHER ORDERED THAT the class action notice to the members of the Absentee Delaware class shall be in the form attached hereto as Exhibit "C."

IT IS FURTHER ORDERED THAT the notice by certified mail to the members of the Kansas Delaware class shall be mailed on or before Friday, November 22, 1974, and that a single notice may be sent to all adults and minors living at any one address.

IT IS FURTHER ORDERED THAT notice by publication to the Cherokee Delaware class shall be given in the Tulsa World.

IT IS FURTHER ORDERED THAT notice by publication to the Absentee Delaware class shall be given in the Andarko Daily News.

IT IS FURTHER ORDERED THAT the notices by publication shall be published in the Sunday, November 24, 1974 issues of the respective newspapers.

IT IS FURTHER ORDERED THAT Plaintiff shall bear the cost of publication of the notices as described above.

Dated this 18 day of November, 1974.

/s/ Fred Daugherty
FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

EXHIBIT "A"

Notice of Class Action Lawsuit—Certified Mail

TO: MEMBERS OF THE KANSAS DELAWARE CLASS OF INDIANS, AS DEFINED BELOW.

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your rights. In No. CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commission Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1866, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906. This notice is being sent to you because you may be a member of the Kansas Delaware class.

In this lawsuit, the representative Plaintiff, Wanda June Weeks, who is represented by Delmer L. Stagner and Stephen P. Friot, of the firm of Halley, Spradling, Stagner and Alpern, Attorneys at Law, Oklahoma City, Oklahoma, and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, represented by John Ghostbear, Attorney at Law, of Tulsa, Oklahoma, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgement funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty, both the Cherokee Delawares and the Absentee

Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott have been designated by the Court as the representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committe, it members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Kansas Delaware class. You will be bound by the judgment in this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT. The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

/s/ FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

EXHIBIT "B"

Notice by Publication of Class Action Lawsuit

TO: MEMBERS OF THE DELAWARE TRIBE OF INDIANS, DESIGNATED HEREIN AS THE CHEROKEE DELAWARE CLASS OF INDIANS, AS DEFINED BELOW.

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your rights. In No. CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commission Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1866, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

In this lawsuit, the representative Plaintiff, Wanda June Weeks and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906. This notice is being sent to you because you may be a member of the Cherokee Delaware class.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgement funds, and, as to the portion of the funds which is compensation for the breach of the 1854

treaty, both the Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Cherokee Delaware class is represented in this lawsuit by Bruce Miller Townsend, Attorney at Law, Tulsa, Oklahoma, and Clyde J. Watts, Attorney at Law, Oklahoma City, Oklahoma. The Absentee Delaware class is represented in this lawsuit by Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma, and by Duard Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior, Washington, D. C.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott have been designated by the Court as the representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, it members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Cherokee Delaware class. You will be bound by the judgment in this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate ap-

pearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT. The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

/s/ FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

EXHIBIT "C"

Notice by Publication of Class Action Lawsuit

To: MEMBERS OF THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA NOW KNOWN AS THE DELAWARE TRIBE OF WESTERN OKLAHOMA, DESIGNATED AS THE ABSENTEE DELAWARE CLASS OF INDIANS, AS DEFINED BELOW.

TAKE NOTICE THAT:

Two consolidated lawsuits are pending in the United States District Court for the Western District of Oklahoma (Federal Court in Oklahoma City, Oklahoma) which will affect your rights. In No. CIV-73-586-E, the Plaintiff, Wanda June Weeks (on behalf of herself and the "Kansas Delaware" class of Delaware Indians, as defined below); and in No. CIV-74-368-D, the Plaintiffs, Dorothy Frazier and Ruth Rattler (on behalf of that portion of the Kansas Delaware class which is descended from Lewis Ketchum), assert certain claims with respect to the funds held by the Defendant Rogers C. B. Morton, Secretary of the Interior of the United States, for payment of the judgments in Indian Claims Commission Dockets numbered 337, 72 and 298.

The Kansas Delaware class consists of all persons who have an ancestor who elected, pursuant to the "Treaty With the Delawares" of July 4, 1866, between the Delaware Nation and the United States of America, not to emigrate to Indian Country and whose name or the name of a lineal ancestor does not appear on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

In this lawsuit, the representative Plaintiff, Wanda June Weeks and the representative Plaintiffs, Dorothy Frazier and Ruth Rattler, claim that they and the Kansas Delaware class are entitled to receive all of the funds appropriated by Congress to pay the judgment award handed down by the Indian Claims Commission in Dockets 72 and 298, and that the Kansas Delaware class and the Absentee Delaware class, to the exclusion of the Cherokee Delaware class, are entitled to receive all of the funds appropriated to pay the judgment award in Indian Claims Commission Docket 337. These awards were made as compensation for breaches by the United States of treaties with the Delaware Nation. The treaties which were breached were signed in 1818 and 1854.

Secondarily, the Plaintiffs claim that if the Kansas Delaware class is not found to be entitled to receive all of the judgment funds in Dockets 72 and 298, then the Kansas Delaware class is at least entitled to share in said funds with the "Cherokee Delaware" class and the "Absentee Delaware" class.

The Cherokee Delaware class consists of all persons whose name or the name of a lineal ancestor appears on the Delaware Indian per capita Payroll approved by the Secretary of the Interior on April 20, 1906.

The Absentee Delaware class is made up of those persons whose name or the name of a lineal ancestor is on or eligible to be on the constructed base census roll of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior. This notice is being sent to you because you may be a member of the Absentee Delaware class.

The Cherokee Delawares and the Absentee Delawares deny that the Kansas Delawares have a right to receive all of the judgement funds, and, as to the portion of the funds which is compensation for the breach of the 1854 treaty, both the Cherokee Delawares and the Absentee

Delawares deny that the Kansas Delawares should be entitled to share with the Cherokee Delawares and the Absentee Delawares. As to the portion of the judgment funds which is compensation for the breach of the 1818 treaty, the Cherokee Delawares deny that the Kansas Delawares have any entitlement to share and the Absentee Delawares contend that only those Kansas Delawares who filed applications to share (and whose applications were approved) may share.

The Cherokee Delaware class is represented in this lawsuit by Bruce Miller Townsend, Attorney at Law, Tulsa, Oklahoma, and Clyde J. Watts, Attorney at Law, Oklahoma City, Oklahoma. The Absentee Delaware class is represented in this lawsuit by Givens L. Adams, Assistant United States Attorney, Oklahoma City, Oklahoma, and by Duard Barnes, Assistant Solicitor for Indian Affairs, United States Department of the Interior, Washington, D. C.

The Delaware Tribal Business Committee, its members and their successors in office and the Defendants Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine and Y. A. Scott have been designated by the Court as the representatives of the Cherokee Delaware class. The Absentee Delaware Tribe of Oklahoma Business Committee, it members and their successors in office, and the Defendants Arthur L. Thomas, Alene Martinez, Myrtle Holder, Tommy Holder, Lawrence Snake and Charles Taylor have been designated by the Court as the representatives of the Absentee Delaware class.

As stated above, this notice is being sent to you because you may be a member of the Absentee Delaware class. You will be bound by the judgment in this action, whether or not favorable to you. If you so desire, you may, no later than December 16, 1974, enter your separate appearance in these actions, either in your own behalf or through counsel of your own selection.

THIS NOTICE SHOULD NOT BE UNDERSTOOD AS AN EXPRESSION OF ANY OPINION OF THE COURT AS TO THE MERITS OR CORRECTNESS OF ANY CLAIMS OR DEFENSES ASSERTED IN THIS LAWSUIT. The sole purpose of this notice is to inform you of this lawsuit so that you may take what steps, if any, you desire to take in relation to it.

Dated: November 18, 1974, at Oklahoma City, Oklahoma.

/s/ FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

Amendment To Answer

(Filed March 12, 1975)

These Defendants, the Delaware Tribal Business Committee, Bruce Miller Townsend, Nathan H. Young, Mary Townsend Crow, Henry A. Secondine, and Y. A. Scott, amend the Answer filed on November 16, 1973 in the case of Wanda June Weeks, Plaintiff vs. United States of America, et al. under Civ-73-586-E and do hereby allege and state as follows, to-wit:

1. These Defendants ratify each and every defense and allegation as contained in said Answer filed November 16, 1973, save and except the following in which these Defendants respectively delete, to-wit:

a. That the language of the 8th Defense is deleted, added and reasserted so as to make same read:

> "No constitutional issue is properly raised because Plaintiff, on her own behalf and purportedly on behalf of all others similarly situated, are not proper parties to be considered members of the Delaware Tribe of Indians, did not file a claim before the Indian Claims Commission pursuant to the Act of August 13, 1946, (60 Stat. 1049) nor joined in the appeal to the Court of Claims, nor made appearances before the Congress of the United States. Further, Plaintiffs did not file a claim before the Indian Claims Commission under Docket 337 or appear before the Court of Claims or before the Congress of the United States and were given the right to apply and appeal from rejected applications."

b. That the language of the 21st paragraph of the 12th Defense (erroneously spelled "twelveth" at page 4) is deleted, added and reasserted so as to make same read:

> "These Defendants admit the allegations contained in sentences 2, 3, 7, 8 and 9 and deny the allegations contained in sentences 4, 5, 10 and 11 and have no knowledge or information sufficient to form a belief as to the truth of sentence 1 of said paragraph 21. These Defendants, with regard to sentence 6 thereof, admit the allegation that the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Indians contend that said 'Kansas Delawares' are not entitled to share in judgment given in Dockets 72 and 298."

2. In all other respects these Defendants ratify and affirm said Answer filed November 16, 1973 by this Amendment in said case of Weeks vs. U.S.A., et al. Civ-73-586-E.

This Intervenor, the Delaware Tribe of Indians, for Amendment to its Answer previously filed herein in the case of Dorothy Frazier and Ruth Rattler, Plaintiffs, vs. Rogers B. Morton, individually and in his capacity as Secretary of the Interior of the United States of America, Defendant, the Delaware Tribe of Indians, Intervenor, under Civ-74-368-D, said Answer having been filed on or about the 31st day of December, 1973, hereby ratifies and affirms each and every material allegation and denial as contained in said Answer in accordance with the following, to-wit:

1. Said Intervenor does hereby ratify and affirm each and every material allegation and denial found in said Answer and does hereby amend said Answer in the following, to-wit:

a. That the language of the 4th Defense is deleted, added and reasserted so as to make same read:

> "No constitutional issue is properly raised because Plaintiffs Frazier and Rattler were not and are not proper parties to be considered as members of the Delaware Tribe of Indians, did not file a claim before the Indian Claims Commission under Docket 337, nor joined in the appeal to the Court of Claims, nor made appearances before the Congress of the United States and although having actually received monies supposedly as members of the Delaware Tribe of Indians in May, 1971 and entered on that roll. Further, Plaintiffs did not file a claim before the Indian Claims Commission under Docket 337 nor appeared before the Court of Claims or before the Congress of the United States and were given the right to apply and appeal from rejected applications."

b. That the language of the 9th paragraph of the 7th Defense is deleted, added and reasserted so as to make same read:

> "Applicant admits that a partial distribution of Docket 337 judgment funds was made to certain persons pursuant to 25 U.S.C. 1181 et seq."

c. That the language of the 10th paragraph of the 7th Defense is deleted, added and reasserted so as to make same read:

> "Applicant has no direct knowledge as to the allegations contained in paragraph 10 of Plaintiffs' First Claim of Complaint."

In all other respect, Intervenor ratifies and affirms the Answer hereinbefore filed in the case of Frazier and Rattler, Plaintiffs, vs. Morton, Defendant and the Delaware Tribe of Indians, Intervenor.

/s/ BRUCE MILLER TOWNSEND
BRUCE MILLER TOWNSEND and CLYDE J. WATTS
Attorneys for Defendant DELAWARE TRIBAL BUSINESS COMMITTEE, BRUCE MILLER TOWNSEND, NATHAN H. YOUNG, MARY TOWNSEND CROW, HENRY A. SECONDINE, Y. A. SCOTT and DELAWARE TRIBE OF INDIANS, *Intervenor*

(Certificate of Service Omitted in Printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

Reporter's Transcript of Trial Proceedings

Had on May 27, 1975

United States Courthouse
Oklahoma City, Oklahoma

BEFORE: THE HONORABLE WILLIAM J. HOLLOWAY
THE HONORABLE FRED DAUGHERTY
THE HONORABLE LUTHER B. EUBANKS

Tim Holmes, C.S.R. 3321 Federal Building
232-5000
U.S. Court Reporter Oklahoma City, Oklahoma

• • •

[Tr. p. 127] Mr. Stagner: No.

Judge Holloway: It will be received.

Mr. Adams: Your Honor, we would request to go back to the affadavit and make an offer of the Secretary and Delaware Tribe of Indians Exhibit Number 31, which is an affadavit of Henry Secondine, dated May 26, 1975.

Judge Holloway: Any objection?

Mr. Stagner: Object to it on the grounds of hearsay.

Judge Holloway: I thought we had ruled on that one previously for Mr. Secondine's affadavit, unless this is a separate affadavit.

Mr. Townsend: It is.

Mr. Adams: It is a separate one.

Judge Holloway: The ruling is the same, the objection is sustained on the grounds that the Exhibit 31 is hearsay.

Mr. Adams: And with that, Your Honor, the Secretary of Interior and the Delaware Tribe of Indians rest.

Judge Holloway: Any further evidence for the Defendants?

Mr. Rothbaum: Yes, Your Honor. The Absentee Delaware class Defendant, Intervenor Defendant, have a few exhibits to submit for the Court's examination into evidence. I regret that I do not have extra copies and that the exhibits are out of order in numerical sequence. The reason for that, [Tr. p. 128] Your Honor, is that in an effort, in light of the large number of documentary materials which both sides had, these were submitted on a list for examination by Plaintiff's Counsel and Plaintiffs did have the same for Defense Counsel. They still bear the numbers they bore at that time and because of the possibility of duplication I have had to remove several since it would have been duplicates of documents that have already been introduced in evidence today, or offered for production; and, therefore, I would start with Exhibit Number Nine with explanation.

If that is acceptable to the Court, I would, of course, have extra copies if the Court desires.

Judge Holloway: Very well. This will be Absentee's Exhibit Nine, then, is that correct?

Mr. Rothbaum: Yes, Your Honor. Which is a letter written in the official course of business from the Acting Associate Commissioner of the Bureau of Indian Affairs to the Senator Fred R. Harris in regard to the membership requirements for the Delaware Tribe of Oklahoma, dated June 18, 1965.

Judge Holloway: Any objection?

Mr. Stagner: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Next is a letter from the—Verrick O. French, Legislative Assistant to Senator Harris.

[Tr. p. 129] Judge Holloway: Which number?

Mr. Rothbaum: I'm sorry, Number Ten. To Mr. Harold Pruner, Claims Representative, and member of the Tribal Council of the Delaware Tribe of Oklahoma, dated September 24, 1968.

For the benefit of the Court, I will state that Mr. Pruner is available in the Courtroom and able to come to the stand if Plaintiffs desire.

Judge Holloway: Any objection?

Mr. Friot: No objection.

Judge Holloway: The Defendant Absentee's Exhibit Ten is admitted.

Mr. Rothbaum: Number Eleven is a letter from Senator Fred Harris to Mr. Pruner, dated September 3, 1968, in regard to testimony on distribution of Indian Claims Legislation, Docket Number 337.

Judge Holloway: Any objection?

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 12 is a letter from Mr. Pruner to Congressman Ed Edmondson, dated October 9, 1969, with regard to the final award entered in Indian Claims Commission Dockets 72 and 298.

Judge Holloway: Any objection?

Mr. Friot: No objection.

[Tr. p. 130] Judge Holloway: There being none, the Defendant Absentee's Exhibit 12 is admitted.

Mr. Rothbaum: Number 14 on our list, which is a telegram from Congressman Edmondson to Mr. Pruner, dated

December 11, 1969, regarding the passage of the distribution legislation for Docket 72 and 298, the Appropriation Statutes.

Judge Holloway: Any objection?

Mr. Friot: No objection.

Judge Holloway: There being none, the Defendant's Exhibit 14 is admitted.

Mr. Rothbaum: Exhibit 15 is again a letter from Mr. Pruner to Senator Harris, this letter is dated December 17, 1969, in regard to the legislation on the final award entered in 72 and 298 and the date for the hearings which were to be held by the Senate in regard to the distribution of that final award.

Mr. Friot: No objection.

Judge Holloway: No objection, it will be admitted.

Mr. Rothbaum: Number 16 is a copy, which has been submitted to Plaintiffs for examination, of agenda on the Sub-Committee on Indian Affairs, Commission on Insulary Affairs, United States House of Representatives, in regard to the testimony and witnesses on the witness list on HR 5200, which was distribution of legislation for Dockets—Indian Claims Commission Dockets 72 and 298.

[Tr. p. 131] Judge Holloway: Any objection?

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 17 is a letter from Lewis A. Sigler, who was, at the time, Chief Counsel and Consultant on Indian Affairs for the House Interior Committee to Mr. Lawrence Snake, President of the Delaware Tribe, in regard to the distribution and legislation, 72, 298. Mr. Snake is available in the Courtroom and available to be called to the Courtroom if the Plaintiff so desires.

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 18 is a letter from Mr. Sigler to Mr. Pruner, it is a—its substance is identical to the previous exhibit.

Judge Holloway: Any objection?

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 19 is a letter from Senator Henry M. Jackson, Chairman on the Committee on Interior and Insulary Affairs, dated July 12, 1972, to Mr. Lawrence Snake, in regard to Senate Bill 1067, distribution legislation upon the final award and docket, Indian Claims Docket 72 and 298.

Mr. Friot: No objection.

[Tr. p. 132] Judge Holloway: There being none, it will be admitted.

Mr. Rothbaum: Number 20 is a letter from Mr. Snake to Senator McGovern, Chairman of the Indian Affairs Sub-Committee, dated July 18, 1972, in regard to Senate Bill 1067; same subject matter as the previous bill—as the previous exhibit, that is, the same bill.

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 21 is a letter from Senator Bellmon to Mr. Pruner, dated August 1, 72, in regard to hearings on the distribution legislation for the final award entired in Indian Claims Docket 72 and 298.

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 22 is a letter from Mr. Snake to—I beg the Court's pardon. From Mr. Snake to Chairman Aspinall, of the House Committee on Interior and Insular Affairs, dated September 19, 1972, same subject matter.

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: 23, Exhibit Number 23, is a letter from Mr. Pruner to Mr. Lewis A. Sigler in regard to the same subject matter; that is, the Indian Claims Commission final award entered in Docket 72 and 298, the date is September 26, 1972.

[Tr. p. 133] Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 25 is a memorandum submitted by the Associate Solicitor of the Division of Indian Affairs of the Department of Interior, submitted to him by Mr. Louis L. Rochmes, Attorney for the Delaware Tribe of Indians and the Absentee Delaware Tribe on July 14, 1972.

Mr. Friot: May I first examine this?

Mr. Rothbaum: Certainly.

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 26 is the response to that letter and the memorandum from Mr. William A. Gershuny, Associate Solicitor of the Division of Indian Affairs, written to Mr. Rochmes, dated July 26, 1973; and it, I believe, constitutes an official government document.

Judge Holloway: Any objection?

Mr. Friot: May I inquire of counsel, the date according to the list of exhibits of the Absentee Delawares is January 26th.

Mr. Rothbaum: Is that not what I said?

Mr. Friot: You said July 26th.

Mr. Rothbaum: Made an error, January 26, 1973.

Judge Daugherty: Of '73?

[Tr. p. 134] Mr. Rothbaum: January 26, 1973, yes, Judge.

Judge Holloway: No objection, Exhibit 26 is admitted.

Mr. Rothbaum: Exhibit 27 is memorandum written May 16, 1973 by Charles E. Delaney, Acting Area Director of Anadarko Indian Affairs, in regard to membership resolution of the Absentee Delaware Tribe, approval of the membership resolution by the Acting Assistant Commissioner, the governing resolution of the tribe and including official certified copies of the same.

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: 28 is an official certified copy of the official membership resolution of the Delaware Tribe of Oklahoma, certified by the Department of Interior December 22, 1956.

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 29 is a letter from the Acting Area Director of the Anadarko Area of the Bureau of Indian Affairs, dated April 16, 1957, written to the Commissioner of the Bureau of Indian Affairs regarding membership resolution which have been sent to the Acting Area Director by the Delaware Tribe of Western Oklahoma.

Mr. Stagner: If the Court please, on this line of testimony we, of course, have our objection as to [Tr. p. 135] materiality, which the Court told us would extend throughout. We didn't really renew this as to this Defendant but

I think the record shows that we do object to any of these that are offered on the basis of the issue of tribality. We have a continuing and running objection to materiality.

Judge Holloway: That is correct, you do.

Mr. Stagner: To it as well as the other Defendants.

Judge Daugherty: Only as to materiality, is that right?

Judge Holloway: Judge Daugherty was asking you, only as to materiality?

Mr. Stagner: Yes, sir.

Judge Holloway: Very well. The objection is overruled and Defendant's Exhibit 29 is received.

You do have a continuing objection on that ground.

Mr. Rothbaum: Exhibit Number 31 is a certified copy of the governing Resolution of the Delaware Tribe, it was certified by the Assistant Secretary of the Interior, July 5, 1958.

Mr. Friot: No objection.

Judge Holloway: It will be received.

Mr. Rothbaum: Exhibit Number 34 is a letter from the Acting Superintendent of the Anadarko Agency certifying the results of an election taken in regard to the question of whether or not the constitution and By-laws of the Delaware Tribe would or would not be approved.

[Tr. p. 136] Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Exhibit 38 through 40 I introduce as a group rather than separate them, if that is agreeable with the Court. They consist of the following: Exhibit 38 is a memorandum from the Commissioner, Bureau of Indian Affairs, dated February 3, 1969, to the Area Director of

the Anadarko Area, in regard to the constructed based roll of the Delaware Tribe of Western Oklahoma.

Judge Holloway: You might better see if we can take objection, if any, as we go. That's 38.

Mr. Friot: No objection to 38.

Mr. Rothbaum: I would add for the benefit of the Court, this is the roll referred to in 25 U.S.C. 1291 through 1297; that's the so-called 1940 rolls.

Judge Holloway: Exhibit 38 is admitted.

Mr. Rothbaum: Exhibit 38 is the memorandum certifying it as the official roll.

Exhibit 39 is the certificate of approval of the roll from the Acting Assistant Commissioner of the Bureau of Indian Affairs, and this is dated February 3, 1969.

Judge Holloway: Any objection to 39?

Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: Number 40 is the Roll itself.

[Tr. p. 137] Mr. Friot: No objection.

Judge Holloway: It will be admitted.

Mr. Rothbaum: These are attached as a group, Judge Holloway, because of the two letters of transmittal.

Judge Holloway. Very well. Exhibits 38 through 40 without objection, are received.

Mr. Rothbaum: And upon that, this Defendant closes proof.

Judge Holloway: Very well. Is there further proof from the Defendant, the Cherokee Delawares?

Mr. Townsend: No further proof, if Your Honor please.

Judge Holloway: Is there any rebuttal evidence?

Mr. Stagner: Yes, sir. We will have several rebuttal evidence in view of the Court's overruling our materiality. I wonder if we could have ten minutes before we commence on that. I believe there will be a lot of documentary evidence, I don't believe there will be any live witnesses in the case.

Judge Eubanks: How long do you estimate, Mr. Stagner, that you estimate it will take you to put on your documentary evidence?

Mr. Stagner: Oh, perhaps—I believe we can get it done in an hour. It's just going through the motions again, as we did before, getting it in, getting the record

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III. THE JUDGMENT, ORDER AND DECISION

(The opinion and judgment of the District Court were printed in the Jurisdictional Statement of Appellants Delaware Tribal Business Committee, *et al.* in No. 75-1301, and are not reprinted herein. The Opinion appears at pages 1a-87a; the Judgment is at pages 88a-89a. The Judgment and Opinion were also printed as part of Appendix A, pages 1-90 of the Jurisdictional Statement of Appellants Absentee Delaware Tribe of Oklahoma Business Committee, *et al.* in No. 75-1335.)

IV. PARTS OF THE RECORD TO WHICH THE PARTIES WISH TO DIRECT THE COURT'S PARTICULAR ATTENTION

Plaintiff's Exhibit 1 (Vol. XXV of the Appeal Record).

VERIFICATION OF ELIGIBILITY TO SHARE IN DELAWARE JUDGMENT FUNDS

Pursuant to Act of October 3, 1972

This form must be completed by or on behalf of all persons who were enrolled pursuant to the Act of September 21, 1968 and should be mailed or delivered to the Area Director, Bureau of Indian Affairs, Federal Building, Muskogee, Oklahoma 74401, *no later than February 28, 1973.*

PENALTY FOR PRESENTING FRAUDULENT CLAIM: Fine of not more than $10,000 or imprisonment for not more than 5 years, or both. (See 62 Stat. 698)

I SHARED IN THE DISTRIBUTION OF DELAWARE JUDGMENT FUNDS FROM INDIAN CLAIMS COMMISSION DOCKET 337 AND HEREBY CLAIM MY SHARE OF THE DELAWARE PER CAPITA PURSUANT TO THE ACT OF OCTOBER 3, 1972, DOCKETS 72 AND 298.

1. Present name: Weeks, Wanda June.

2. My name as listed on docket 337: Weeks, Wanda June.

3. Sex: Female.

4. Birthdate: March 14, 1931.

5. Present mailing address: 3200 S.W. 42, Oklahoma City, Oklahoma 73119

6. Date:

7. Was #1 living on October 3, 1972?

8. Signature of enrollee or sponsor:

9. Relationship to enrollee if person signing is not same as #1:

YOU DO NOT NEED TO ATTACH BIRTH CERTIFICATE
COMPLETE FOLLOWING IF ENROLLEE IS DEAD

10. Date Enrollee Died:

ATTACH DEATH CERTIFICATE TO BACK OF THIS FORM

Recommendation of Tribal Review Committee:

.....Approval

.....Rejection

Signature of Examiner

Plaintiff's Exhibit 4 (Vol. XXV of the Appeal Record).

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

August 16, 1973

Mrs. Wanda June Weeks
3209 S. W. 42
Oklahoma City, Oklahoma 73119

Dear Mrs. Weeks:

You appealed the rejection of the applications filed for the persons listed below for enrollment to share in the judgment funds awarded to the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma in Indian Claims Commission Dockets 298 and 72, being distributed pursuant to the Act of October 3, 1972 (86 Stat. 762):

Brenda June Weeks
Michael Arley Weeks
Wanda June Weeks

Section 2 of the statute directs the Secretary of the Interior to prepare a roll of all persons who meet the following requirements:

(a) they were born on or prior to and were living on the date of this Act; and

(b) they are citizens of the United States; and

(c)(1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

The Muskogee Tribal Operations Officer of the Bureau of Indian Affairs, acting under delegation of authority, rejected your application because you did not prove that you have a lineal ancestor whose name appears or was entitled to appear on the 1906 Delaware Indian per capita payroll.

According to the records, you are descendants of Annie Grinter, a Delaware Indian who chose to remain in Kansas pursuant to Article 9 of the Treaty of July 4, 1866 (14 Stat. 793), between the United States and the Delaware Tribe, who, therefore, did not emigrate to the Cherokee Nation with the rest of the Delaware Tribe. The Treaty specified in Article 9 that after the Kansas Delawares had received certificates of citizenship, fee patents and their pro rata shares of annuities and trust property held by the United States for the Delaware Tribe they would cease to be members of the Delaware Tribe and thereafter lose their eligibility to participate in Delaware councils and share in the property or annuities of the Delaware Tribe. The records of the National Archives indicate that the Kansas Delawares received fee patents to their Kansas lands, were issued certificates of citizenship and received their pro rata shares of annuities and trust property held by the United States for the Delaware Tribe. Inasmuch as the conditions of Article 9 of the Treaty were fulfilled, the Kansas Delawares ceased to be members of the Delaware Tribe, and therefore, were not entitled to be included on the 1906 per capita payroll.

The fact that the Area Director did not act on your applications within 60 days of receipt has no bearing on your eligibility for enrollment. You still must meet the requirements specified in the Act in order to qualify for enrollment to share in the judgment funds.

Sharing in the Docket 337 Delaware judgment funds is not sufficient to establish eligibility for enrollment to share

in the funds being distributed under the 1972 Act. You have failed to establish that you meet the requirements for enrollment specified in the Act. Therefore, it must be concluded that you are not entitled to share in the distribution of the judgment funds awarded the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma.

Therefore, it must be concluded that you are not entitled to share in the distribution of the judgment funds awarded the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma.

Pursuant to the authority to decide enrollment appeals delegated to the Solicitor by the Secretary of the Interior your appeal is denied.

Sincerely yours,

/s/ DUARD R. BARNES
Associate Solicitor
For Division of Indian Affairs

Excerpts from Plaintiff's Exhibit 51c
(Vol. XXVI of the Appeal Record).

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MUSKOGEE AREA OFFICE
MUSKOGEE, OKLAHOMA 74401

Memorandum

To: Commissioner of Indian Affairs
From: Division of Tribal Operations, MAO
Subject: Appeals from Rejections of Enrollment Applications. We enclose the timely filed appeals for

Bessie B. Stock	Vera F. Cox
George W. Grinter, Jr.	Loyd Russell Vaughn
George W. Grinter III	Robin Gale Cox
Robert Eugene Grinter	Debra Renae Cox
Eunice O. Johnson	Clarence A. Weeks, III
Joyce Gail Denzer	Steve Alan Weeks
Wallace Reed Hodge	Martin Alden Weeks
Jewel Jenice Hodge	Brenda June Weeks
David Edward Hodge	Michael Arley Weeks
Kevin Richard Denzer	Annie K. Langford
Katherine E. Ware	George Warren Byrd
Mary Ione Grinter	Richard Lee Byrd
Dennis Eugene Stock	Robert W. Byrd
Kathy Ann Stock	Michael Warren Byrd
Mary Jane Leiter	Georgia Diane Garland
Kenneth Charles Martin	Jerrod L. Garland
Scott Bly Leiter	Jason L. Garland
Shari Carmel Leiter	Arthur Conyne Cox III
Gary Alan Leiter	Wanda Weeks

from rejections of applications for enrollment to share in dockets 72 and 298 judgment funds being distributed pursuant to the Act of October 3, 1972 (86 Stat. 762).

These persons traced to a common ancestor, Annie Grinter, a Delaware Indian listed on the 1868 Annuity Payroll; however, they are unable to prove they have a lineal ancestor on the 1906 Delaware per capita payment roll or eligible to be on that roll.

We recommend the appeals be denied and dismissed.

Sincerely yours,

Tribal Operations Officer

Secretary of the Interior
Bureau of Indian Affairs
Muskogee Area Office
Muskogee, Oklahoma

This is to notify you that I appeal the rejection of my application to share in the Delaware judgment funds from Indian Claims Commission Dockets 72 and 298.

Please refer to the appeal letter of Wanda Weeks for further information.

Brenda June Weeks
Sponsor Wanda June Weeks

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MUSKOGEE AREA OFFICE
MUSKOGEE, OKLAHOMA 74401

CERTIFIED MAIL—RETURN RECEIPT REQUESTED—
ADDRESSEE ONLY

June 5, 1973

Wanda June Weeks For:
Brenda June Weeks
3200 S. W. 42
Oklahoma City, OK 73119

This letter is to officially notify you that your application to share in the Delaware judgment funds from Indian Claims Commission dockets 72 and 298 has been rejected. The Act of October 3, 1972 (86 Stat. 298) sets forth the requirements for eligibility. You were rejected for the following reason:

(1) You have not proven that you have a lineal ancestor whose name appears on the Delaware Indian per capita payroll approved by the Secretary of the Interior on April 20, 1906.

You may appeal or request reconsideration the rejection of your application to the Secretary of the Interior. If you decide to appeal, it is important for you to follow the instructions contained in this letter and those that are attached as an enclosure. The following is a summary of the instructions pertaining to appeals.

(1) Address your appeal to the Secretary of the Interior; in care of the Area Director, Bureau of Indian Affairs, Muskogee, Okla. 74401 Attention: Tribal Operations—Delaware.

(2) Your appeal letter must be received within 30 days after you receive this notice of rejection. (We have a record of the date you received this notice)

(3) Send any documents that support your eligibility. (See paragraph 42.5 of the attached regulations.

Additional time to obtain more evidence or other documents may be granted, but will be granted only when supported by adequate reason and justification.

Appeals will be forwarded to the Secretary of the Interior for a final decision. Those who appeal will be notified of the final decision by the Secretary.

Sincerely yours,

/s/ JACOB AHTONE
Jacob Ahtone
Tribal Operations Officer

May 1, 1973

Honorable Lloyd Meeds
Chairman, Subcommittee on Indian Affairs
Committee on Interior and Insular Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Meeds:

Thank you for your letter of March 27 on behalf of Mrs. Wanda Weeks concerning the distribution of Delaware judgment funds pursuant to the Act of October 2, 1972.

Section 2 of the Act authorized the Secretary of the Interior to prepare a roll of persons who meet the following requirements:

(a) They were born on or prior to and living on the date of the Act; and

(b) they are citizens of the United States; and

(c)(1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

In a memorandum to the Bureau of Indian Affairs dated February 17 the Assistant Solicitor, Division of Indian Affairs, Department of the Interior stated, in part:

"* * * In so determining the qualifications for payment, there is no indication in the legislative history that Congress concluded that the 1906 roll was complete and without need for additions while at the same time specifically recognizing the possible need for additions to the 1940 roll.

"Consequently, I believe it is legally proper to interpret the 1972 Act * * * that there should be included on the payment roll being prepared on the basis of the 1906 and 1943 rolls those persons, or descendants of such persons, who were qualified to be on either the 1906 or 1943 rolls but who are not actually named on either roll."

Both Mr. Sidney M. Carney, Area Director, Anadarko Area Office, and Mr. Thomas J. Ellison, Acting Area Director, Muskogee Area Office of the Bureau of Indian Affairs have been advised of the Assistant Solicitor's memorandum and are implementing this interpretation of the Act of October 3, 1972, in the preparation of the roll which will serve as the basis for distributing the judgment funds.

Because Mrs. Weeks shared in the distribution of the Delaware judgment funds pursuant to the Act of September 21, 1966, she should have received a letter of verification from the Muskogee Area Director. Please urge Mrs. Weeks to return this letter if she has not already done so. Regulations issued to govern the preparation of the roll did not require persons who applied for the 1968 Act to apply for enrollment under the Act of October 3, 1972. However, they are required to furnish current information as to their whereabouts. If Mrs. Weeks has any further questions concerning her enrollment, she should write directly to the Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs, Federal Building, Muskogee, Oklahoma 74401.

Sincerely yours,

/s/ Raymond V. Butler
Acting Director, Office of
Community Services

Wanda Weeks
3200 S. W. 42
Oklahoma City, Okla. 73119

Secretary of the Interior
In care of Area Director
Bureau of Indian Affairs,
Muskogee, Oklahoma

This letter is to notify you that I appeal the rejection of my application to share in the Delaware judgment funds from Indian Claims Commission Dockets 72 and 298.

I was aware of the strict language of the law and I ask Congressman John Jarman to present an amendment to Congress to read "They are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the treaty of October 3, 1818, and their name or the name of a lineal ancestor appears on any available census roll or any other record acceptable to the secretary." I was informed that an agreement had been reached by the Tribe and the Bureau of Indian Affairs to allow those Delawares who were ineligible under the strict language of the law to share in this distribution without an amendment to the law.

The treaty of 1854 comprised 557,955 acres, and the government realized $1,057,898.19 from the sale which amount was placed in the national fund. My Great-Grandmother Annie Grinter was a member of the Delaware Tribe of Indians at this time.

Public Law 92-456 provides "The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment." On February 5, 1973 I took my application and my families to the Muskogee Area Office. We did not receive our rejection notice until June 7, 1973.

Below is a list of my close family, whose separate appeals are attached. They were approved on Docket 337.

Wanda June Weeks

Bessie B. Stock
George W. Grinter Jr.
George W. Grinter III
Robert Eugene Grinter
Eunice O. Johnson
Joyce Gail Denzer
Wallace Reed Hodge
Jewel Jenice Hodge
David Edward Hodge
Kevin Richard Denzer
Katherine E. Ware
Mary Ione Grinter
Dennis Eugene Stock
Kathy Ann Stock
Mary Jane Leiter
Kenneth Charles Martin
Scott Bly Leiter
Shari Carmel Leiter
Gary Alan Leiter
Vera F. Cox
Loyd Russell Vaughn
Robin Gale Cox
Debra Renae Cox
Clarence A. Weeks III
Steve Alan Weeks
Martin Alden Weeks
Brenda June Weeks
Michael Arley Weeks
Annie K. Langford
George Warren Byrd
Richard Lee Byrd
Robert W. Byrd
Michael Warren Byrd
Georgia Diane Garland
Jerrod L. Garland
Jason L. Garland
Arthur Conyne Cox III

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MUSKOGEE AREA OFFICE
MUSKOGEE, OKLAHOMA 74401

PER CAPITA
Annie Grinter

April 3, 1970

Mrs. Wanda June Weeks
3200 Southwest 42
Oklahoma City, OK 73119

Dear Mrs. Weeks:

Applications to be enrolled to share in Delaware judgment money from docket 337 have been received for the following:

Wanda June Weeks
Clarence Adelbert Weeks III
Steve Alan Weeks
Martin Alden Weeks
Brenda June Weeks
Michael Arley Weeks

Each individual named above has been determined to be eligible to be enrolled to share in the distribution of the money from docket 337.

The money cannot be paid until sometime after the deadline date for filing applications, which is December 31, 1969, and until all the applications which we will receive have been processed and approved or disapproved, all appeals to the Secretary of the Interior from ineligibility notices have been decided, and the payment roll prepared and approved.

Please notify us of all changes of address. Please give the name of your tribe and application number when writing us.

Sincerely yours,

/s/ CLYDE BUSEY
Clyde Busey
Supervisory Claims Examiner

enclosures

BC—Wanda June Hodge; Clarence Adelbert Weeks III; Steve Alan Weeks; Martin Alden Weeks; Brenda June Weeks; Michael Arley Weeks

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MUSKOGEE AREA OFFICE
MUSKOGEE, OKLAHOMA 74401

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
ADDRESSEE ONLY

Wanda June Weeks
3200 S. W. 42
Oklahoma City, OK 73119

June 5, 1973

This letter is to officially notify you that your application to share in the Delaware judgment funds from Indian Claims Commission dockets 72 and 298 has been rejected. The Act of October 3, 1972 (86 Stat. 298) sets forth the requirements for eligibility. You were rejected for the following reason:

(1) You have not proven that you have a lineal ancestor whose name appears on the Delaware Indian per capita payroll approved by the Secretary of the Interior on April 20, 1906.

You may appeal or request reconsideration the rejection of your application to the Secretary of the Interior. If you decide to appeal, it is important for you to follow the instructions contained in this letter and those that are attached as an enclosure. The following is a summary of the instructions pertaining to appeals.

(1) Address your appeal to the Secretary of the Interior; in care of the Area Director, Bureau of Indian Affairs, Muskogee, Okla. 74401 Attention: Tribal Operations—Delaware.

(2) Your appeal letter must be received within 30 days after you receive this notice of rejection. (We have a record of the date you received this notice)

(3) Send any documents that support your eligibility. (See paragraph 42.5 of the attached regulations.

Additional time to obtain more evidence or other documents may be granted, but will be granted only when supported by adequate reason and justification.

Appeals will be forwarded to the Secretary of the Interior for a final decision. Those who appeal will be notified of the final decision by the Secretary.

Sincerely yours,

/s/ JACOB AHTONE
Jacob Ahtone
Tribal Operations Officer

Defendants Secretary and Delaware Tribal Business Committee's Exhibit 24. Resolution of Delaware Council. April 29, 1904 (Vol. XXIX of the Appeal Record).

Whereas, by an item contained in the Act of Congress approved on the 21st day of April, A. D., 1904, it was provided as follows:

> "The Secretary of the Treasury is authorized and directed to pay to the Delaware Tribe of Indians residing in the Cherokee Nation, as said tribe shall in Council direct, the sum of one hundred and fifty thousand dollars in full of all claims and demands of said tribe against the United States, and the same is hereby appropriated and made immediately available: Provided, That said sum shall be paid only after the tribal authorities, thereunto duly and specifically authorized by the tribe, shall have signed a writing stating that such payment is in full of all claims and demands of every name and nature of said Delaware Indians against the United States, which writing shall be subject to the approval of the President of the United States and shall have provided for the discontinuance of all actions pending in all courts wherein said Delaware Indians are plaintiff and the United States defendants."

and whereas the said Delaware Tribe of Indians, in order to duly consider said provision, and to take such action thereon as, after due deliberation, shall seem just and for their best interest, have met in General Council and discussed the same in its relations to their past history and present relations to the United States, make the following declaration of their position:

THEREFORE BE IT RESOLVED BY THE DELAWARE TRIBE OF INDIANS RESIDING IN THE CHEROKEE NATION IN GENERAL COUNCIL ASSEMBLED,

FIRST. That the Delaware Tribe of Indians residing in the Cherokee Nation consists of all Delaware Indians, now living, whose names appear upon a certain roll made by John G. Pratt, February 18, 1867, and all whose names were added thereto on or before May 8, 1867, which roll was known as the Delaware Register (there being originally nine hundred and eighty-five Delawares so registered), and all living descendants of such registered Delaware Indians.

SECOND. That "the tribal authorities" of the said Delaware Tribe of Indians consists of,

1st. A General Council, which is a mass meeting of the members of said Tribe called together by the representatives or the Business Committee of the Tribe.

2nd. The Business Committee, as elected by a vote of the people cast on February 1, 1895, under the direction of W. H. Simms, Acting Secretary, dated December 21, 1894, being George Bullette, Chairman, John Young, John Sarcoxie, Jr., Henry Armstrong, and John Sacondyne.

3rd. The representatives of the Delaware Tribe of Indians residing in the Cherokee Nation, who are duly authorized to act for the Council of said Tribe, and the Business Committee of said Tribe, being Richard C. Adams and John Bullette.

THIRD. The Delaware Indians through their tribal authorities thereunto duly and specifically authorized by said Delaware Indians do hereby accept and receive from the United States the sum of one hundred and fifty thousand dollars ($150,000.00) in full settlement and discharge of all claims, debts or demands of every name and nature which the said Delaware Tribe of Indians have against the

United States; and the Attorney General of the United States, in pursuance of the Act of Congress approved the 21st day of April, 1904, is hereby authorized and requested by proper motion to cause to be dismissed all actions or suits pending in any courts wherein the said Delaware Indians are plaintiffs and the United States are defendants, the said Delaware Indians hereby expressly consenting to such dismissal of such suits or actions.

FOURTH. We hereby authorize and empower our representatives, Richard C. Adams and John Bullette, and our Business Committee, or a majority thereof, to sign a writing statement the purpose of this resolution, and to file the same with the President of the United States, and to request and demand that a warrant be drawn in favor of the cashier of some National Bank, at the discretion of our representatives, and Business Committee, for the full amount of $150,000, the same to be deposited subject to the checks of Hon. Matthew S. Quay, unless he can not disburse the same to the Tribe, then to be subject to the checks of James Blair Shoenfelt, and that Hon. Matthew S. Quay be requested to make a per capita payment to the Delaware Indians in the manner hereinafter set forth, or if the said Hon. Matthew S. Quay shall not consent to make a per capita payment to the Delaware Indians then James Blair Shoenfelt be requested to make a per capita payment to the Delaware Indians so as to give to each man, woman and child whose names appear upon a certain roll, which is to be made by the Delaware Business Committee, an equal distribution of the money, after deducting therefrom the expenses incurred by the Delaware Business Committee in making such roll and after paying the Delaware Business Committee the sum of $5.00 per day each while they are actually engaged in making the pay-roll, and in defraying other expenses that might incur, and the sum of $2,000 is hereby appropriated which amount is to be placed to the credit of the Delaware Business Committee by our representatives in some national bank, to be subject to the checks of George Bullette, Chairman of the Business Committee, and whoever shall succeed him, the same to be used to defray the contingent expenses in covering the items herein named and such other matters as the Council hereafter shall direct and the Chairman of the Business Committee is required to report at the next Council and each Council hereafter of the Delaware Indians the amount they expended and the amount yet on hand, and the further sum of $5,000 is hereby appropriated with which to pay such members of the Delaware Tribe of Indians residing in the Cherokee Nation whose names may be added to the pay-roll at the time of the payment, and such portion of said sum as shall remain undistributed shall become a part of the money appropriated for the use of the Business Committee under the direction of the Delaware Council, and shall be accounted for in the manner hereinbefore set forth.

FIFTH. The roll shall be made as follows:

To contain the name of each and every Delaware Indian and the descendants of each and every Delaware Indian, living at this time, and all who may be born before the payment is made, who become citizens of the Cherokee Nation by reason of a certain agreement entered into between the Delaware Tribe of Indians and the Cherokee Nation, dated April 6, 1867. The payment shall be made to the adult member of the Tribe whose names appear upon this roll; to the husband and father, if he be a Delaware Indian, for his wife and minor children; to the mother for her minor children if the father be dead, or if he be not a Delaware Indian, and in case of a minor child having neither father or mother of Delaware blood, then the payment shall be made to the guardian appointed by law.

SIXTH. The Business Committee is hereby directed to make the pay-roll in quadruplicate, and to deliver them to the party making the payment, which roll shall be signed

by the person receiving the money, in the presence of the Business Committee, who shall certify that they were present when the payment was made, and witnessed the signatures of the parties whose names appeared thereon, and shall also certify as to how much money was left over from said payment to be covered back as above set forth to the contingent fund of said Tribe.

SEVENTH. One copy of the roll shall then be filed with the United States Indian Agent for the Union Agency at Muskogee, Indian Territory, one copy delivered to Honorable Matthew S. Quay; one copy to be delivered to Richard C. Adams; and one copy forwarded to the Commissioner of Indian Affairs for the files of his offce.

EIGHTH. The Business Committee while in Washington shall investigate into the question as to the character and extent of the services that have been performed and the money expended in the interest of the Delaware Tribe of Indians by our representatives during the time they have been employed by the Delaware Tribe of Indians, and the contracts they have made with attorneys to assist them, and shall make a full report in writing and in person to a General Council of this tribe to be called by the Chairman of said Business Committee for that purpose before a payment shall be made to the Delaware Tribe of Indians.

NINTH. BE IT FURTHER RESOLVED, That the Chairman of this Council shall deliver five copies of this resolution to our representative, Richard C. Adams, who is hereby instructed to file one copy with the President of the United States; one copy with Hon. Matthew S. Quay; one copy with the Secretary of the Treasury; one copy with James Blair Shoenfelt, and to keep one copy himself, and Richard C. Adams and John Bullette, our representatives, and such members of the Business Committee as will accompany them to Washington are hereby authorized and required to sign such writings as our tribal authorities, and in the

name of the Delaware Tribe of Indians, and do such things as will be necessary and proper to do in the premises, the same as we and each and all of us could do if personally present at the doing thereof.

Done at Dewey, Indian Territory, this 29th day of April, A.D., 1904.

JOHN H. SACONDYNE,
Chairman.

J. M. MCCRACKEN,
Sec'y of Council.

Excerpts from Defendants Secretary's and Delaware Tribal Business Committee's Exhibit 18. Certified Copies of Material Used in Determining Eligibility of Individuals (Vol. XXIX of the Appeal Record).

RICHARD C. ADAMS
REPRESENTING DELAWARE INDIANS
BOND BUILDING
WASHINGTON, D.C.

January 25, 1905

The Honorable Secretary of the Interior,
Washington, D.C.

Sir:—

The act of the general council assembled of the Delaware Indians on the 12th and 13th of October, 1904, at Dewey, Indian Territory, provided that the United States Indian Agent for the Union Agency make a roll of the Delaware Indians residing in the Cherokee Nation, with the aid and assistance of the various departments of the Government, providing that the Delaware Council or the Delaware Business Committee shall have a right to inspect said roll before payment is made.

At the request of and on behalf of the Delaware Indians, I respectfully urge that this roll be made at as early a date as possible; also, that the question of the rights of the Delawares, known as the Kansas Delawares, be determined, as was suggested by the Attorney-General, by the Comptroller of the Treasury at an early date so that the Agent will know whether to place their names upon this roll or not. The persons we call Kansas Delawares are Delaware Indians who remained in Kansas in 1867; who did not participate in the agreement with the Cherokee Nation; who became citizens of the United States and drew out their part of the funds, and took their part of the allotments in

Kansas, who afterwards sold their lands in Kansas and purchased citizenship in the Cherokee Nation independent of the action of the other class of Delaware Indians.

The Delaware Indians at the various councils held, in deliberating over the appropriation of $150,000.00, contended that the Kansas Delawares, having settled in full in Kansas, had no right to participate in this money, (I believe there would be about sixty or seventy of this class of Delaware Indians), while, on the other hand, the Kansas Delawares contended that they were a part of the Delaware Tribe of Indians residing in the Cherokee Nation, and that these various claims arose from treaty stipulations in which their interests with the other Delawares were identical.

The answer of the majority of the council to this was that, while they may be Delaware Indians residing in the Cherokee Nation, they had settled with the Government and with the Delawares in full in Kansas, and separated themselves from the rest of the Tribe.

I respectfully request that these questions be determined immediately, and that the Agent be instructed to prepare a roll, and that the payment be made by check by the Treasury Department, the checks to be sent to Agent Shoenfelt and by him dispersed to the Delaware Indians at Dewey, Nowata and Vinita.

Please answer this communication to Dewey, Indian Territory. I start for the West today, and would be glad to advise the Delawares what they might expect.

I am,

Yours respectfully,

/s/ RICHARD C. ADAMS

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON, MARCH 22, 1905

U.S. Indian Agent,
Union Agency, I.T.

Sir:

The Indian Appropriation Act of April 21, 1904 (33 Stats., 222), contains the following provisions:

> "The Secretary of the Treasury is authorized and directed to pay to the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct, the sum of one hundred and fifty thousand dollars in full of all claims and demands of said tribe against the United States, and the same is hereby appropriated and made immediately available: *Provided,* That said sum shall be paid only after the tribal authorities, thereunto duly and specifically authorized by the tribe, shall have signed a writing stating that such payment is in full of all claims and demands of every name and nature of said Delaware Indians against the United States, which writing shall be subject to the approval of the President of the United States and shall have provided for the discontinuance of all actions pending in all courts wherein said Delaware Indians are plaintiff and the United States defendants."

All of the conditions prescribed in the foregoing having been complied with, and the sum of $37,200 having been disbursed for attorneys' fees by authority of the tribal council, it only remains now to pay over the balance, amounting to $112,800, to the tribe in the manner directed by said council.

On October 13, 1904, the Delaware Indians in council adopted a resolution, which has been approved by the

President, as required by law, and of which the following is a part:

> "And we do hereby authorize and empower the United States Indian Agent, for the Union Agency, to make a roll of the Delaware Indians residing in the Cherokee Nation, with aid and assistance of the various departments of the government, and to pay to the Delaware Indians per capita the full amount of the money appropriated by the Act of Congress aforesaid, provided that the Delaware Business Committee of the Delaware Council shall have a right to inspect said roll before payment is made."

In accordance with his resolution, the duty of preparing a roll and distributing the money to the Indians per capita is hereby devolved upon you. As to who are entitled to share in the payment, the Comptroller of the Treasury, in a decision rendered on the 1st instant, says:

> "From the language of the act and conditions therein imposed, I think it clear that the appropriation of $150,000 was made for, and payable only to the Delaware *tribe* of Indians, as said tribe by its council direct, and that the Delaware Indians who, under the provisions of Articles III and IX of the treaty of July 4, 1866, *supra,* elected to dissolve their tribal relations, and became citizens of the United States are not legally entitled to be enrolled for participation in the distribution of said sum."

The Comptroller then goes on to say that the New York Indians who were enrolled with the Delaware tribe that removed from Kansas to the Indian Territory as a part of said tribe, although not members thereof by blood or adoption, do not come within the provisions of the act above quoted, and concludes his opinion in the following language:

> "I therefore have the honor to advise you that the 'Delaware Tribe of Indians residing in the Cherokee Nation' within the meaning of the last named act, con-

sists only of the members of the Delaware tribe by blood or adoption who, under the treaty of July 4, 1866, elected to preserve their tribal relations and who entered into and carried out the agreement with the Cherokees of April 8, 1867, and their descendants."

I enclose, for your information, a copy of the aforesaid opinion of the Comptroller, and also a copy of a decision rendered by the United States Attorney General on December 31, 1904, touching the various quotations of law involved in the execution of the act. With these papers as a guide, you are directed to prepare a roll containing the name and a brief description of each Indian entitled to share in the payment, and submit the same for examination by this Office and the approval of the Department. Said roll must be based upon the records of the Five Civilized Tribes Commission, and inspected by the Delaware Business Committee as provided for in the resolution adopted by the tribal council. As evidence that the roll has been inspected as stated, it should contain a certificate signed by two or more duly authorized members of the Business Committee, to that effect.

When your roll has been received and approved it will be returned to you and the money will be placed to your credit. You will then proceed with the disbursement under the rules prescribed for regular annuity payments in articles 7 to 24, section 324 of Office Regulations, except that the shares of orphan minors and any persons who may die between the closing of the roll and the payment will be paid to guardians and administrators appointed by a court of competent jurisdiction. The letters of guardianship and administration in these cases, or certified copies thereof, must be filed with the voucher as evidence of proper payment.

Very respectfully,

/s/ L. F. Larrabee
Acting Commissioner

Approved March 27, 1905.
E. A. Hitchcock
Secretary of the Interior

Defendants Secretary's and Delaware Tribal Business Committee's Exhibit 25 (Vol. XXIX of the Appeal Record).

Adopted September 7, 1958

Resolution Establishing By-Laws Under Which the Delaware Tribal Business Committee Shall Speak and Act in Behalf of the Delaware Tribes of Indians.

Whereas, it is expensive and inconvenient for the individual members of the Delaware Tribe to meet in General Council for the transaction of all tribal business; said tribal business has heretofore been administered through an administrative body designated The Delaware Tribal Business Committee,

Whereas, it is the intent and desire of the individual members of the Delaware Tribe, 21 years of age and over, to define the manner under which the Delaware Tribal Business Committee shall represent, speak and act for the individual members of the Delaware Tribe on matters affecting the properties and general business of the Tribe,

Whereas, the Delaware Tribe has not heretofore through means of written documentation defined the mechanics under which said Committe shall be elected and function,

Now Be It Therefore Resolved That:

Section 1 (A). The Delaware Tribal Business Committee shall consist of a Chairman, Vice-Chairman, Secretary-Treasurer, and two members, all of whom shall be elected by secret ballot and who shall serve for a period of four years.

(B) Three members of the Delaware Tribal Business Committee shall constitute a quorum for the official transaction of tribal business.

Section 2. No person shall be a candidate for membership in the Delaware Tribal Business Committee unless he shall

be a member of the Delaware Tribe by blood and shall be at least 25 years of age.

Section 3 (A). The first election of a Tribal Business Committee under this Resolution shall be called and supervised by the Area Director of the Muskogee Area Office or his authorized representative in accordance with election procedures outlined by him. Thereafter, elections shall be held every four years in July prior to the expiration of the terms of office of the members of the Delaware Business Committee. The date and place shall be designated by the Delaware Tribal Business Committee, and thirty (30) days prior to the election, public notice shall be given. The terms of office of members of the Delaware Tribal Business Committee shall be for four years, or until their successors are elected, qualified and installed.

(B) Regular elections shall be held every fourth year commencing from the year 1958 A.D. Nominations shall be made from the floor. Election shall be by secret ballot, a plurality vote being necessary to elect. The newly elected officers shall be installed immediately upon their election.

(C) If the Delaware Tribal Business Committee shall fail to give appropriate notice of the election, or in case a regular election shall not be held as in Section 3 of this Resolution, the Commissioner of Indian Affairs or his authorized representative shall call such an election and shall give thirty (30) days' notice, setting the time and place of the election.

Section 4. Vacancies in any elective office shall be filled at any regular or special meeting of the Delaware General Council, providing that proper notice has been given.

Section 5. . . . The Delaware Tribal Business Committee is hereby empowered to appoint subordinate committees and representatives; to transact business of the Delaware Tribe, including the management or disposition of tribal

property and the expenditure of tribal funds; and such additional business of the Tribe as the Delaware General Council may see fit to delegate to the Delaware Tribal Business Committee from time to time by appropriate resolution; provided, however, that any ordinances passed by the Delaware Tribal Business Committee governing membership, future membership or the loss of membership, shall be subject to the approval of the Delaware General Council, and, so long as the affairs of the Delaware Tribe are under the general supervision of the Federal Government, of the Commissioner of Indian Affairs or his authorized representative. . . .

Section 5 (A). A Grievance Committee, consisting of five persons of Delaware Indian blood, shall be elected by the General Council, and shall not include any members of the Delaware Tribal Business Committee. The term of office of the Grievance Committee shall be for four years and the members shall be elected at the same time and in the same manner as that provided for the election of the members of the Delaware Tribal Business Committee.

(B) The Grievance Committee shall investigate complaints of misconduct or other acts of the members of the Delaware Tribal Business Committee and upon a proper showing shall request the Chairman to call a special meeting of the Delaware General Council to act upon such complaints. In the event the Chairman refuses or fails to call such a meeting the Grievance Committee shall advise the Commissioner of Indian Affairs or his authorized representative, who shall call the special meeting of the Delaware General Council for the purpose of hearing and acting upon such complaints. Such Council shall have power, by a majority vote, after giving the accused a hearing, to clear him of the charges; or to remove him from office, if guilty, and proceed to elect a successor, except if a member of the Delaware Tribal Business Committee fails to or refuses to attend two regular meetings in succession unless

excused due to illness or other causes for which he cannot be held responsible, or shall be convicted of a felony, or a misdemeanor involving moral integrity, his office shall be forfeited automatically, and a special election shall be called by the Chairman of the Delaware Tribal Business Committee for his replacement, in accordance with Section 4 of this Resolution.

Section 6. It shall be the duty of the Chairman of the Delaware Tribal Business Committee to preside at all meetings and perform all duties appertaining to the office. He shall exercise all authorities delegated to him and he shall be entitled to a vote on all questions.

Section 7. In the absence of the Chairman of the Delaware Tribal Business Committee, the Vice-Chairman shall perform the duties of the Chairman, assuming all the privileges, duties and responsibilities of the Chairman.

Section 8 (A). The Secretary-Treasurer shall correctly record all proceedings of all meetings and shall forward copies of the minutes of all meetings to the Area Director and to the Commissioner of Indian Affairs. He shall be responsible for the prompt and efficient handling of all correspondence pertaining to the Business of the Council. He shall make out the order of business for the Chairman; shall notify all committees of their appointments; shall have custody of the records and all papers of the Council which records and papers shall be open to inspection at any reasonable time, in his presence, by any members of the Council desiring to review them. He shall keep a correct list of all members of the Council, shall authenticate all accounts or orders of the Council, and in the absence of the Chairman and the Vice Chairman, shall call the meeting to order until a Chairman Pro-Tem is selected. He shall render a written report at the annual meeting and at the expiration of his term of office, records and all papers in his possession shall be turned over to his successor. He shall issue notices of all meeting and conduct all general correspondence, as directed by the General Council or the Tribal Business Committee. He shall keep all tribal monies entrusted to his care in a special account and all disbursements therefrom should be made by check. He shall keep an accurate account of receipts and disbursements of all such tribal monies and make appropriate reports to the Delaware Tribal Business Committee and to the Delaware General Council at its annual meetings. The accounts and records of the Delaware Tribal Business Committee and the General Council shall be open at all times for inspection and audit by the Commissioner of Indian Affairs or his authorized representative.

(B) The Secretary-Treasurer shall file a surety bond satisfactory to the Tribal Business Committee and to the Commissioner of Indian Affairs or his authorized representative. The cost of such bond shall be paid from tribal funds.

Section 9. Special meetings of the Delaware General Council may be called at the discretion of the Chairman, and shall be called by him at the request in writing of the majority of the Tribal Business Committee, or by a written request of thirty per cent of the members of the General Council.

Section 10. The regular meetings of the Delaware Tribal Business Committee shall be held at a place and time to be determined by the Chairman, with proper notice to the members of the Committee during the months of January, April, July and October unless otherwise provided by Resolution.

Section 11. Special meetings of the Delaware Tribal Business Committee may be called by the Chairman at his discretion and shall be called by him upon the written request of a majority of the Business Committee.

Section 12. All meetings of the Delaware General Council and the Delaware Tribal Business Committee shall be conducted in accordance with Robert's Rules of Order.

Section 13. This Resolution may be amended by a majority vote of the qualified voters of the Delaware Tribe of Indians of Delaware blood at an election called for the purpose by the Delaware Tribal Business Committee. It shall be the duty of the Chairman of the Delaware Tribal Business Committee to call such an election or referendum at the request of a majority of the Delaware Tribal Business Committee, or upon presentation of a petition signed by at least thirty per cent of the qualified voters, members of the Delaware Tribe: PROVIDED that not less than thirty days' notice of such meeting and proposed amendment shall be given to the members of the Tribe directly by mail, if feasible, and by appropriate publication throughout the communities in which the Tribal members reside.

The foregoing resolution was duly adopted this 7 day of Sept., 1958.

/s/ H. L. MCCRACKEN
Chairman, Delaware Tribal Business Committee

/s/ BRUCE M. TOWNSEND
Vice-Chairman, Delaware Tribal Business Committee

This is to certify that there were approximately 350 of the adult members of the Delaware Tribe at the above General Council meeting; that there were 2 opposing votes and a few not voting on the above resolution, and the resolution was therefore adopted, . . . FOR, 132 votes.

/s/ ILLEGIBLE
Area Director and Presiding Officer

/s/ MARIE L. WADLEY
Tribal Affairs Officer and Secretary Pro-Tem
Approval:

/s/ JAMES E. OFFICE
Commissioner, Bureau of Indian Affairs

May 31, 1962

SUPREME COURT OF THE UNITED STATES

Nos. 75-1301, 75-1335 and 75-1495

DELAWARE TRIBAL BUSINESS COMMITTEE, et al., *Appellants,*

v.

WANDA JUNE WEEKS, et al.

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, et al., *Appellants,*

v.

WANDA JUNE WEEKS, et al.

THOMAS A. KLEPPE, SECRETARY OF THE INTERIOR, et al., *Appellants,*

v.

WANDA JUNE WEEKS, et al.

APPEALS from the United States District Court for the Western District of Oklahoma.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one and one-half hours is allotted for oral argument. In case No. 75-1335 the parties are invited to address particularly questions 1, 4 and 9 presented by the jurisdictional statement.

June 14, 1976

Supreme Court, U. S.
FILED
APR 12 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1301

UNITED STATES OF AMERICA, ET. AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS,
Appellee,

and

STANLEY K. HATHAWAY, ET AL.,
Appellants,

VERSUS

DOROTHY FRAZIER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

APPELLEES' MOTION TO DISMISS APPEAL

DELMER L. STAGNER
STEPHEN P. FRIOT
Counsel for Appellees

of Counsel:

SPRADLING, STAGNER, ALPERN & FRIOT
Suite 700, Continental Savings Building
101 Park Avenue
Oklahoma City, Oklahoma 73102

HENRY B. TALIAFERRO, JR.
CASEY, LANE & MITTENDORF
815 Connecticut Avenue N.W.
Washington, D.C. 20006

April, 1976

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Introductory Statement	1
Argument	3
Conclusion	10

Certificate follows Brief.

TABLE OF AUTHORITIES

CASES:

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ... 10

Cherokee Nation v. Journeycake, 155 U.S. 196, 15 S.Ct. 55, 39 L.Ed. 646 (1904) ... 7

McGhee v. United States, 122 Ct.Cl. 380 (1952), cert. den., 344 U.S. 856, 73 S.Ct. 91, 97 L.Ed. 665 ... 6

Minnesota Chippewa Tribe v. United States, 161 Ct.Cl. 258, note 12 ... 6

STATUTES:

25 U.S.C. §70(a), 60 Stat. 1050 ... 5-6

25 U.S.C. §§1291-97, 86 Stat. 762 ... 3

43 U.S.C. §189, 18 Stat. 410 ... 7

In the
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1301

UNITED STATES OF AMERICA, ET. AL.,
Appellants,

VERSUS

WANDA JUNE WEEKS,
Appellee,

and

STANLEY K. HATHAWAY, ET AL.,
Appellants,

VERSUS

DOROTHY FRAZIER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

APPELLEES' MOTION TO DISMISS APPEAL

The Appellees, Wanda June Weeks, Dorothy Frazier and Ruth Rattler, individually and as members of the Kansas Delaware class, move the Court to dismiss the appeal filed herein by the Appellants, the members of the Cherokee Delaware class, for the reasons that the questions presented in the Jurisdictional Statement filed herein are not presented by this case.

This Court is asked by the Appellants to issue an advisory opinion and to decide abstract questions of law. The matter presented for review was not decided by the District Court in such a manner as to be a predicate for the presented questions. The District Court did not decide that the subject funds were tribal assets. Its holding was based upon its finding that the funds were to be distributed to individuals on a per capita basis without regard to any present tribal affiliations. That the District Court erred in so treating the funds is not presented as a question. The Jurisdictional Statement merely *assumes* that such funds were tribal assets and that the recipients were all members of presently recognized Indian tribal entities. Its argument is then based on the assumption that this is a dispute between non-tribal Indians on the one hand and tribal Indians on the other.

The Appellants, in their Conclusion, state the question to be whether the Courts can, or should, question the *wisdom* of Congressional decisions as to how funds for Indians are to be distributed. The "wisdom" of Congress in this matter is not in issue. At the trial, the Cherokee Delaware class urged that in Indian affairs, Congress can do anything that it pleases to do. The District Court held that the Due Process Clause of the Fifth Amendment prevents invidious discrimination between classes with equal standing. The fact that the members of each class were of Indian descent did not, it is submitted, deprive the Court of jurisdiction to apply time-honored standards to determine whether the discrimination violated the Due Process rights of the parties, and finding that such rights were violated, to declare the legislation unconstitutional.

ARGUMENT

The challenged statute (86 Stat. 762, 763, 25 U.S.C. §§1291-97) provides for distribution of funds appropriated to pay an award entered in the Indian Claims Commission for a breach of the 1854 treaty between the Delaware Tribe and the United States (10 Stat. 1048) (Appendix 98a). That statute provided that the funds to be distributed under Section 1292 are to be paid to individuals on a per capita basis according to a roll to be prepared for such purpose by the Secretary of the Interior. To be eligible to be placed on such roll, it is provided that a person must have been born on or before October 3, 1972, must be a citizen of the United States and his name or the name of a lineal ancestor must be on either (a) the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (b) his name or the name of a lineal ancestor must be on or be eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

The above criteria, it should be noted, make no reference whatever to such persons having any tribal relationship with any tribe. The distribution is provided to be on a lineal descendancy basis to individuals, not tribes, and wholly without regard to whether such persons have, or have ever had, any continued membership. The "Delaware per capita payroll" referred to was not a tribal roll. The constructed base census roll of 1940 (Absentee Delaware Roll) was not a tribal roll and, if it was, it was not required that recipients be on such roll if they had an ancestor who was eligible to be on such roll. The Absentee tribal

constitution requires that tribal members be of at least 1/8th Absentee Delaware blood. Hence, all persons qualifying for payment who have less than 1/8th Absentee Delaware blood are not eligible to be tribal members.

This discussion of the challenged statute is necessary for an understanding of the fallacies in the Jurisdictional Statement filed in this appeal.

In their Jurisdictional Statement, the Appellants herein make certain misleading references to the distribution Act in question. These references are as follows:

Page 3, Line 18	". . . should be distributed solely to those currently holding citizenship in the Delaware Nation . . ."
Page 5, Line 9	". . . Delawares who maintained their tribal citizenship through the 'Delaware Indian Tribe' or the 'Absentee Delaware Tribe' . . ."
Page 10, Line 3	". . . 90 percent on a per capita basis to tribal members . . ."
Page 10, Line 32	". . . only to, or for the benefit of, tribal members . . ."
Page 11, Line 23	". . . are tribal citizens . . ."
Page 12, Line 1	". . . members of the tribe . . ."
Page 14, Line 8	". . . on the basis of membership in Delaware social-political groups . . ."
Page 14, Line 16	". . . tribal Delawares . . ."
Page 15, Line 7	". . . what is clearly tribal property. . . ."
Page 15, Line 19	". . . tribal nature of Indian property. . . ."

Page 15, Line 25	". . . to recognized Indians . . ."
Page 16, Line 3	"The decision to distribute only to Delaware nationals . . ."
Page 16, Line 13	". . . to tribal citizens . . ."
Page 17, Line 18	". . . as tribal Delawares . . ."

The above references betray the lack of understanding by the Appellants of the individual, not tribal, nature of the distribution. The discussion of the questions presented by the Appellants is based wholly upon the assumption that the distribution statute limited payments to only "tribal" members when it is obvious that there is no such limitation.

This case involved the simple question of whether, if Congress elects to distribute funds on a lineal descendancy basis, it may discriminate between classes of lineal descendants on a basis that is rationally unrelated to the purpose of the distribution. The District Court, in holding that Congress could not so discriminate, applied the standards approved by this Court in a long line of cases under the Due Process component of the Fifth Amendment. No new or novel question is presented for review.

No contention is made that Congress does not have the power to appropriate and distribute public monies to Indian tribes. Congress, in this instance, did not appropriate and provide for distribution of these funds to an *Indian tribe*, but to individual lineal descendants, not of tribal members, but of persons on two rolls, neither of which were tribal rolls. The utilization of these rolls as a means of tracing ancestry is not questioned here.

The Indian Claims Commission Act provides for claims to be made by tribes, bands or other identifiable groups (25

U.S.C. §70(a), 60 Stat. 1050). It is recognized that claims may not belong only to tribes or bands of tribes. Where there is an identifiable group whose ancestors were members of an Indian tribe at the time of the wrong, the Court of Claims has recognized the right of such persons to share in an award for such wrong, even though they are not organized, since they would not benefit at all from an award to the organized tribe. *McGhee* v. *United States*, 122 Ct.Cl. 380, 388, 396 (1952), *cert. den.*, 344 U.S. 856, 73 S.Ct. 91, 97 L.Ed. 665; *Minnesota Chippewa Tribe* v. *United States*, 161 Ct.Cl. 258, 271, note 12.

The Appellants' reasoning in their arguments in support of the substantiality of the questions presented in their Jurisdictional Statement, insofar as they are based upon their ill-conceived understanding that these funds belong to "recognized tribes" and is ordered distributed to "members of such tribes," fails by virtue of the real nature of the funds and the distribution plan.

There are other references in the argument in support of the substantiality of the questions presented which mislead the Court. On page 8 of the Jurisdictional Statement, the Appellants state that "[t]he Delaware tribe is a continuing quasi-sovereign entity." The challenged statute in Section 1294(b) provides that no funds which are to be placed to the credit of the tribe in the United States Treasury are to be used "until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members." Obviously, no such entity existed which could be said to have had a quasi-sovereign status. The historical facts in this case show that the Delaware Tribe as a sovereign entity was abolished in

1867 and the members were absorbed into the Cherokee Nation. *Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 15 S.Ct. 55, 39 L.Ed. 646 (1904). Since 1896, the only function of the Business Committee formed by the Cherokee Delaware Band of the Cherokee Nation has been to present claims against the Government. It is a gross distortion of the facts to state that the Delaware Nation is an existing tribe with sovereign immunity in any real sense.

The Appellants, throughout their arguments, refer to the Kansas Delaware class as descendants of expatriated tribal members without reference to the fact that this class is also descendant from minor members of the tribe of 1866 who never resigned from the tribe and never relinquished any rights. The Appellants also fail to refer to an Act of 1875 (18 Stat. 410, 43 U.S.C. §189) which restored to Indians any rights which they may have given up by having theretofore abandoned their tribal relations. This effort to portray the Kansas Delaware class as persons whose rights have been lost through the historical events since the wrong in 1854 can mislead this Court into its understanding of the equal footing which the members of this class have with the other lineal descendants of members of the tribe in 1854.

The Appellants, on pages 9 and 10 of their Jurisdictional Statement, say that the District Court inquired into the "motives" of Congress in enacting the challenged distribution Act.

The Appellants contend that the Congress deliberately and with knowledge that it was excluding the Kansas Delaware class changed the distribution plan from one utilized for a prior distribution to Delaware Indians. The District

Court searched the legislative history and determined that this contention was wholly without merit (Appendix, pages 31a through 35a). To make it clear that this was the purpose of such inquiry into legislative history, the District Court appended to its opinion as Appendix A a portion of the transcript of hearings before Congressional Subcommittees. This transcript shows that there was no deliberate exclusion of the Kansas Delawares. The change upon which the Appellants rely was wholly and totally unrelated to the Kansas Delawares, but related to a group known as Munsee Indians. The District Court discussed this matter in full in its opinion and it is not correct to represent to this Court that "motives" were the basis for the legislative history search. Further, it is wrong to assert, as the Appellants do on pages 10 and 11, that Congress enacted the challenged statute "knowing full well that it was excluding expatriate Delawares." The record amply supports the finding by the District Court that Congress "was never apprised that adoption of the Cherokee and Absentee Delaware proposals for limiting the distribution provisions would have the effect of excluding a group of people, such as the Kansas Delawares, who were unquestionably lineal descendants of the Delaware Nation in 1854, who had lived on the Kansas Delaware lands, and who had not participated in any judgment to another tribe" (Appendix, page 33a, note 29).

The Appellants, on page 14 of their statement, state that the Kansas Delawares "did not surface in these proceedings until after the Indian Claims Commission had acted (after protracted hearings), Congress had acted (after hearings), and chance of obtaining a cash windfall had appeared."

The record in this case shows that the Chairman of the Business Committee of the organization which calls itself the Delaware Tribe of Indians from 1924 to 1951 was a member of the Kansas Delaware class. He was the individual who employed the attorney who filed the Indian Claims Commission suits. On July 14, 1951, at the time of his resignation, the General Council of this organization recognized by resolution that he and other Kansas Delawares were entitled to share in all tribal assets.

The Appellants herein (as the Absentee Appellants in Case No. 75-1335 in this Court) rely heavily for their case on the dissenting opinion of Judge Daugherty. They even suggest that this Court reverse the District Court based upon such opinion and their statements in their arguments. The Appellees in their motion to dismiss the appeal of the Absentee class in the appeal docketed as No. 75-1335 present an analysis of the dissenting opinion and the errors relied upon by Judge Daugherty. These Appellees request this Court to also consider such analysis, contained in the Conclusion of such motion, as also offered in support of this motion.

CONCLUSION

This Court, in *Baker* v. *Carr*, 369 U.S. 186, 216, 217, 82 S.Ct. 691, 709, 710, 7 L.Ed.2d 663 (1962), said:

> "While '"It is for [Congress] * * *, and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage" * * *, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe * * *.' United States v. Sandoval, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107. Able to discern what is 'distinctly Indian,' ibid., the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."

We submit that it would be equally violative of the constitutional rights of excluded lineal descendants of Delaware Indians for the Court to treat property, which Congress has appropriated and provided for distribution to individuals, as "tribal property" when it is not; to consider the business organization which calls itself the Delaware Tribe of Indians as a tribe with sovereign immunity and to deny jurisdiction on the basis of such immunity when no such sovereign or quasi-sovereign tribal unit exists; or to consider two rolls as tribal rolls when they were not and to exclude persons whose ancestors do not appear on such rolls as non-tribal members and on such basis deny them a share in an award to which they clearly can show rights equal to the rights of those whose ancestors' names do appear on such rolls.

The District Court, in an exhaustive and fully documented opinion, found that there was an invidious discrimination against the Appellees. The Appellants offer no substantial questions for this Court to consider in a review of such decision. Certainly, the effort by the Appellants to present the issues in this action as being "intra-tribal" or relating to the administration by the Government of its guardianship duties to unemancipated Indians, or concerning "tribal properties" should not afford a basis for the consideration of the questions presented.

We respectfully submit that the above appeal should be dismissed for lack of presentation of substantial questions.

Respectfully submitted,

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April, 1976

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High & Patton, 323 Fidelity Plaza, Oklahoma City Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant U. S. Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of Interior of the United States; Messrs. Watts, Looney, Nichols, Johnson & Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, counsel of record for Bruce Miller Townsend; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver, Tulsa, Oklahoma 74119, counsel of record for Cherokee Delaware class and named individual members thereof; Messrs. Joseph S. Fontana and John R. Keys, Winston & Strawn, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for Cherokee Delaware class and named individual members thereof; Mr. George C. Christensen, Winston & Strawn, Suite 5000, One First National Plaza, Chicago, Illinois 60603, counsel of record for Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail, first class postage thereon fully prepaid; I further certify that I did, on this ..... day of ....., 1976, serve three true and correct copies of the foregoing upon Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; and Mr. Duard

Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this ..... day of ....., 1976, in conformity with 80 Stat. 613, 28 U.S.C. §518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; I further certify that all parties required to be served have been served.

.....

Delmer L. Stagner

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,
v.
WANDA JUNE WEEKS, *Appellee.*

On Appeal From the United States District Court for the Western District of Oklahoma

BRIEF OPPOSING MOTION TO DISMISS

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The motion to dismiss does not question the legal propositions advanced in the Jurisdictional Statement. It is based ultimately upon the unsupportable theory that there is no Delaware Tribe of Indians to which a tribal distribution may be made and, since there is no tribe, no members thereof to take per capita distributions as tribal members. This fiction is contrary to the finding of the Indian Claims Commission,[1] that of the Court of Claims,[2] the recitals of Congress in the distribution statutes,[3] the unanimous finding of the

[1] *Delaware Tribe of Indians* v. *United States,* 2 Ind.Cl.Comm. 253, 260, 265 (1952); *see id.* 5 Ind.Cl.Comm. at 491-92 (1957).

[2] *Delaware Tribe of Indians* v. *United States,* 128 F.Supp. 391, 398 (Ct.Cl. 1955).

[3] 25 U.S.C. §§ 1291, 1292(c), 1294(b) (Supp. IV, 1974); 25 U.S.C. § 1182 (1970).

District Court that the "Cherokee Delawares" had steadily maintained group identity,[4] and the responsible representations of the Solicitor General in connected case No. 75-1495. The Delaware Tribe of Indians exists. It clearly succeeds to the tribal interests which the fund at issue is intended to compensate.[5]

Moreover, the assertion (Motion, p. 5) that Congress did not provide for distribution to "an Indian tribe" but to individual lineal descendants of persons who were on "two [non-tribal] rolls" warrants no respect: ten percent of the distribution in fact was directed to "the Absentee Delaware Tribe of Western Oklahoma" and to "the Delaware Tribe of Indians" for purposes authorized by the "tribal governing [bodies]." 25 U.S.C. § 1294 (Supp. IV, 1974); Jurisdictional Statement, app. p. 96a. The rolls of tribal members which the motion would have Congress and the Court disregard may not be perfect census rolls of a beleaguered and harried Indian nation but they are, in the judgment of Congress, the best tribal rolls existent. And certainly neither they, nor any tribal roll which might be conceived, contain or would contain the names of the expatriate Kansas so-called Delawares.

The motion meets neither the clear propositions of our Jurisdictional Statement nor those of the Solicitor General in No. 75-1495. It cannot do so. This *is* a case of tribal Indians against citizens solely of the United States who possess some degree of Indian descent. It is that simple. This case, we respectfully suggest, is governed by *Morton* v. *Mancari,* 417 U.S. 535 (1974), and the judgment below well could be reversed on a summary *per curiam* basis on that authority.

[4] Jurisdictional Statement, app. p. 11a and n. 12.

[5] *See* Jurisdictional Statement, p. 8.

We respectfully pray that the judgment below be affirmed insofar as it holds valid the distribution provided in 25 U.S.C. §§ 1181-86 (1970) and the inclusion of the Cherokee Delaware class, the Delaware Tribe of Indians, in the distribution under 25 U.S.C. §§ 1291-97 (Supp. IV, 1974). We further pray that the judgment be reversed insofar as it holds unconstitutional the distribution of Indian Claims Commission judgment funds under 25 U.S.C. §§ 1291-97 (Supp. IV, 1974).

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
GROUNDS ON WHICH JURISDICTION IS INVOKED	2
QUESTIONS PRESENTED FOR REVIEW	2
PROVISIONS OF THE CONSTITUTION, TREATIES AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	14
ARGUMENT	15
I. The Claim of Appellees that the Distribution Statute Should Be Reformed To Include American Delaware Aliens as Beneficiaries of an Award for Violation of a Treaty Made Solely for the Benefit of "the Delaware People" Presents a Political, Nonjusticiable Controversy	15
II. The Distribution of the Indian Claims Commission Award Exclusively to the Federally Recognized Delaware Tribes and Their Members Does Not Deny Due Process of Law to Americans Who Are Descendants of Delaware Indians Who Voluntarily Dissolved Their Relations with the Tribe More than a Century Ago	24
A. If the Matter Be Deemed Justiciable, the "Relatively Relaxed" Standard of Rationality Is To Be Applied in Deciding Whether the Classification of Distribution to Tribal Entities and Their Members Offended Due Process of Law	24
B. Distribution of Treaty Judgment Funds to Federally Recognized Tribes and Tribal Members, by the Use of Established Rolls, Rationally Furthers the Obligation of the Federal Government Toward the Indian Tribes	28

Page

C. The Legislative History of the Statute at Issue Reflects a Clear Congressional Decision To Exclude Descendants from Members of the Tribe at the Time of Injury Who Are Not Members of the Delaware or Absentee Delaware Tribes 36

CONCLUSION 40

ATTACHMENT

Treaty of May 6, 1854, 10 Stat. 1048 ..... 1a
Treaty of July 4, 1866, 14 Stat. 793 ..... 10a
Act of June 22, 1874, ch. 389, 18 Stat. 146 at 175 ..... 21a
Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189 at 222 22a
25 U.S.C. §§ 1181-86 (1970) 23a
25 U.S.C. § 1291-97 (Supp. IV, 1974) 25a

TABLE OF AUTHORITIES

Cases:

Absentee Delaware Tribe of Oklahoma v. United States, 9 Ind. Cl. Comm'n. 346 (1961) 11
Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821) 19
Azure v. Morton, 514 F.2d 897 (9th Cir. 1975) 30
Baker v. Carr, 369 U.S. 186 (1962) 17, 18, 22
Bryan v. Itasca County, 96 S.Ct. 2102 (1976) 30
Charlton v. Kelly, 229 U.S. 447 (1913) 22
Cherokee Freedmen v. United States, 195 Ct. Cl. 39 (1971) 30
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)..15 20
Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States, 512 F.2d 1390 (Ct. Cl. 1975) 21
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) ... 20
Dandridge v. Williams, 397 U.S. 471 (1970 .....35, 36

Page

DeCoteau v. District County Court, 420 U.S. 425 (1975) 19
Delaware Tribe of Indians v. United States, 2 Ind. Cl. Comm'n. 253 (1952) 8
Doe v. Braden, 57 U.S. (16 How.) 635 (1853) 19
Eastern Band of Cherokee Indians v. United States, 117 U.S. 288 (1886) 20, 21, 33, 34
Fisher v. District Court, 96 S.Ct. 943 (1976) 28
Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) 19, 22
Gilligan v. Morgan, 413 U.S. 1 (1973) 18
Gritts v. Fisher, 224 U.S. 640 (1912) 20
Halbert v. United States, 283 U.S. 753 (1931) 30
Hampton v. Mow Sun Wong, 96 S.Ct. 1895 (1976) ... 27
Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872) 18
Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) 32
Kolovrat v. Oregon, 366 U.S. 187 (1961) 18
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 15, 19
Massachusetts Board of Retirement v. Murgia, 96 S.Ct. 2562 (1976) 25, 35, 36
Mathews v. Diaz, 96 S.Ct. 1883 (1976) 28
Mathews v. Lucas, 44 U.S.L.W. 5139 (U.S. June 29, 1976) 36
Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 24
Minnesota Chippewa Tribe v. United States, 315 F.2d 906 (Ct. Cl. 1963) 20, 21
Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 96 S.Ct. 1634 (1976).....26, 28
Morton v. Mancari, 417 U.S. 535 (1974).....18, 19, 25, 26, 28, 30
Northern Cheyenne Tribe v. Hollowbreast, 96 S.Ct. 1793 (1976) 24

	Page
Osage Tribe of Indians v. United States, 66 Ct. Cl. 64 (1928)	19
Quick Bear v. Leupp, 210 U.S. 50 (1908)	29
Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians, 355 F.2d 936 (Ct. Cl. 1965).	30
Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma, 220 U.S. 481 (1911)	19, 28
Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd mem.*, 384 U.S. 209 (1966)	29
Sizemore v. Brady, 235 U.S. 441 (1914)	20, 28, 29
Terlinden v. Ames, 184 U.S. 270 (1902)	22
Tiger v. Western Investment Co., 221 U.S. 286 (1911)	29
Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct. Cl. 1974)	29
United States v. Ferguson, 247 U.S. 175 (1918)	34
United States v. Jim, 409 U.S. 80 (1972)	28
United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970)	27
United States v. Washington, 520 F.2d 676 (9th Cir. 1975)	24
Weinberger v. Salfi, 422 U.S. 749 (1975)	35, 36
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	18

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES:

U.S. CONST. art. II, § 2, cl. 2	3, 18
U.S. CONST. art. III, § 2, cl. 1	3
U.S. CONST. art. VI, cl. 2	18
U.S. CONST. amend. V	3
Act of June 22, 1874, ch. 389, 18 Stat. 146	7

	Page
Act of July 1, 1902, ch. 1375, § 68, 32 Stat. 716	9
Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189	9, 22
Act of Mar. 3, 1931, ch. 401, § 6, 46 Stat. 1487	29
25 U.S.C. § 70a (1970)	23
25 U.S.C. § 71 (1970)	18
25 U.S.C. § 450 *et seq.* (Supp. IV, 1974)	30
25 U.S.C. § 461 *et seq.* (Supp. IV, 1974)	28
25 U.S.C. §§ 565-65g (1970)	31
25 U.S.C. §§ 581-90c (Supp. IV, 1974)	31
25 U.S.C. § 594 (1970)	30
25 U.S.C. §§647-49 (1970)	30
25 U.S.C. § 676a (1970)	31
25 U.S.C. § 690 (1970)	31
25 U.S.C. §§ 786-87 (1970)	31
25 U.S.C. §§ 788a-88h (1970)	31
25 U.S.C. §§ 871-75 (1970)	31
25 U.S.C. §§ 881-81a (1970)	31
25 U.S.C. §§ 882-82a (1970)	31
25 U.S.C. §§ 883-83d (1970)	32
25 U.S.C. §§ 911-14 (1970)	32
25 U.S.C. §§ 961-67d (1970)	32
25 U.S.C. §§ 991-98 (1970)	32
25 U.S.C. §§ 1011-15 (1970)	32
25 U.S.C. §§ 1031-38 (1970)	31
25 U.S.C. §§ 1051-55 (1970)	32
25 U.S.C. §§ 1071-73 (Supp. IV, 1974)	31
25 U.S.C. §§ 1081-88 (1970)	31
25 U.S.C. §§ 1101-05 (1970)	32

Page

25 U.S.C. §§ 1111-21 (1970) 32
25 U.S.C. § 1112 (1970) 31
25 U.S.C. §§ 1131-35 (1970) 32
25 U.S.C. §§ 1141-47 (1970) 31
25 U.S.C. §§ 1151-55 (1970) 32
25 U.S.C. §§ 1161-67 (1970) 31
25 U.S.C. § 1171 (1970) 31
25 U.S.C. § 1181 (1970) 11
25 U.S.C. §§ 1181-86 (1970) 11
25 U.S.C. §§ 1191-95 (1970) 31
25 U.S.C. §§ 1201-05 (1970) 31
25 U.S.C. §§ 1221-27 (1970) 32
25 U.S.C. §§ 1231-36 (1970) 32
25 U.S.C. §§ 1241-48 (Supp. IV, 1974) 32
25 U.S.C. §§ 1261-65 (Supp. IV, 1974) 31
25 U.S.C. § 1262 (Supp. IV, 1974) 30
25 U.S.C. §§ 1271-74 (Supp. IV, 1974) 31
25 U.S.C. §§ 1281-84 (Supp. IV, 1974) 31
25 U.S.C. §§ 1291-97 (Supp. IV, 1974) 5, 12
25 U.S.C. §1292 (Supp. IV, 1974) 9
25 U.S.C. § 1294 (Supp. IV, 1974) 12
25 U.S.C. §§ 1300-1300a-4 (Supp. IV, 1974) 31
25 U.S.C. §§ 1300b-1300b-5 (Supp. IV, 1974) 31
25 U.S.C. §§ 1300c-1300c-5 (Supp. IV, 1974) 31
25 U.S.C. §§ 1300d-1300d-9 (Supp. IV, 1974) 32
25 U.S.C. §§ 1300e-1300e-7 (Supp. IV, 1974) 31
25 U.S.C. § 1300e-1 (Supp. IV, 1974) 30
Treaty of Oct. 3, 1818, 7 Stat. 188 4

Page

Supplemental Article to Treaty of Oct. 3, 1818, 7 Stat. 327 4
Treaty of May 6, 1854, 10 Stat. 1048 .....5, 6, 17, 20
Treaty of July 4, 1866, 14 Stat. 793 .....6, 7, 21

MISCELLANEOUS:

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (U. N.Mex. ed. 1942) 27, 29, 30
11 COMP. DEC. 496 (1905) 10, 22
Hearings on H. R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d. Cong., 2d Sess. (Mar. 13, 1972) (unpublished) 37, 38, 39
25 OP. ATT'Y GEN. 308 (1904) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,

v.

WANDA JUNE WEEKS, *Appellee.*

On Appeal from the United States District Court for the Western District of Oklahoma

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BRIEF FOR THE DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL.

OPINION BELOW

The opinion below is that of a three-judge court of the United States District Court for the Western District of Oklahoma in *Weeks v. United States,* 406 F. Supp. 1309 (W.D. Okla. 1975).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1252 and 1253 (1970). A three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 and 2284 (1970), held unconstitutional an Act of Congress providing for distribution of an Indian Claims Commission award and enjoined the Secretary of the Interior from distributing funds pursuant to the statute. The jurisdiction of the District Court was founded on 28 U.S.C. § 1331 (1970). It entered its judgment on December 18, 1975.

Appellants herein filed a Notice of Appeal on January 16, 1976, and a Jurisdictional Statement on March 12, 1976, which was docketed as *Delaware Tribal Business Committee, et al. v. Weeks,* No. 75-1301. On June 14, 1976, this Court noted probable jurisdiction of the appeal and ordered it consolidated with *Absentee Delaware Tribe of Oklahoma Business Committee, et al., v. Weeks, et al.,* No. 75-1335, and *Kleppe, et al., v. Weeks, et al.,* No. 75-1495.

QUESTIONS PRESENTED FOR REVIEW

1. Where a treaty between the United States and the Delaware Nation expressly provides for the distribution of all proceeds from the sale of tribal land for the benefit of the Delaware people and, where, under a subsequent treaty, certain members of the tribe alienated themselves from the tribe becoming solely Americans and renounced all rights to share in the tribal property, does the claim by their descendants that Congress unlawfully excluded them from participating in compensation awarded by the Indian Claims Commission for failure of the United States to sell the

tribal lands in the manner required by the first treaty present a justiciable controversy?

2. Did Congress act with patent arbitrariness and without rational justification in providing that an Indian Claims Commission award redressing breach by the United States of an 1854 Treaty should be distributed solely to the tribal bodies and to those currently holding citizenship in the Delaware Nation, to the exclusion of persons having Delaware ancestry but whose ancestors, pursuant to treaty with the United States in 1866, for valuable compensation, "dissolved" their Delaware citizenship and became citizens solely of the United States and who thereafter never have been recognized as members of the Delaware Nation?

PROVISIONS OF THE CONSTITUTION, TREATIES AND STATUTES INVOLVED

The pertinent parts of the Constitution provide:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . . U.S. CONST. art. II, § 2, cl. 2.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . . U.S. CONST. art. III, § 2, cl. 1.
>
> No person shall be . . . deprived of . . . property, without due process of law . . . . U.S. CONST. amend. V.

The relevant treaties and statutes involved are set forth in the Attachment to this brief. They are:

> Treaty of May 6, 1854, 10 Stat. 1048.
> Treaty of July 4, 1866, 14 Stat. 793.

Act of June 22, 1874, ch. 389, 18 Stat. 146, 175.
Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222.
Act of Sept. 21, 1968, 25 U.S.C. §§ 1181-86 (1970).
Act of Oct. 3, 1972, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974).

STATEMENT OF THE CASE

Originally resident on the eastern seaboard of what is now the United States, the Delaware Nation inexorably was driven westward and became geographically scattered by the early 19th century. J.S. App. 6a.[1] The main body of the tribe by this time lived on lands in Indiana and Ohio. Some Delawares, known as the Munsees, had migrated to New York and Canada. Others had crossed the Mississippi River to occupy land granted them in Missouri by Spain and, later, to move south to Arkansas, Texas, and Oklahoma. *Id.* Some descendants of these "southern" Delawares eventually settled in western Oklahoma in 1853 and are the ancestors of the modern Absentee Delaware Tribe. J.S. App. 7a-8a.

Through the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana and Ohio to the United States in exchange for land west of the Mississippi and settled in Missouri where they remained until 1829. J.S. App. 6a-7a. In that year the Delawares signed another treaty, designated as a supplemental article to the Treaty of 1818, whereby the Tribe agreed to accept, as part payment for the Indiana cession, a "permanent" reservation in Kansas. 7 Stat. 327; J.S. App. 7a.

[1] J.S. App. references are to the opinions of the District Court which appear in the Appendix to appellants' Jurisdictional Statement in No. 75-1301 at pages 1a-87a.

The Delaware Tribe, on May 6, 1854, entered into another treaty with the United States providing for cession of much of the Tribe's Kansas reservation. 10 Stat. 1048, Attach. 1a. Under Article 1 of the Treaty, the Delawares retained certain of their residence lands (the "diminished reserve") as a home, but ceded the remainder (the "trust lands") and the "hunting outlet." 10 Stat. 1048, Attach. 1a-2a; J.S. App. 8a. In Article 2, the United States promised to offer the ceded land for sale at public auction with the proceeds from all sales to be paid to the Delaware general tribal fund. 10 Stat. 1048-49, Attach. 2a-3a; J.S. App. 8a. In 1856 and 1857, however, the United States breached the provisions of Article 2 by selling the trust lands without public auction. J.S. App. 8a. As a result, the Tribe received far less from the sale of their lands than it should have—a fact which resulted in the Indian Claims Commission award in Dockets 72 and 298 and enactment of the distribution statute, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), the constitutionality of which is the subject of this appeal.

The 1854 Treaty further provided that all proceeds from the land sales in excess of the amount necessary to meet current tribal wants would be paid to "a permanent fund [created] for the benefit of the Delaware people" to be invested by the President of the United States, "the interest to be applied annually for the civilization, education, and religious culture of the Delaware people . . . ." Art. 7, 10 Stat. 1050, Attach. 5a. Moreover, Article 8, expressing the parties' recognition that annual receipts from the sale of lands could not be predetermined, provided that:

> . . . the whole subject be referred to the judgment of the President, who may, from time to time,

> prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment . . . ; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

10 Stat. 1050, Attach. 5a.

In 1866, the Delaware Tribe agreed by treaty to sell the remainder of its Kansas land and to remove to Indian Territory, now Oklahoma. Treaty of July 4, 1866, 14 Stat. 793, Attach. 10a. The United States, in turn, agreed to apply the proceeds from the sale of the Delaware land to the purchase of 160 acres of land from other tribes in Oklahoma for each Delaware. Art. IV, 14 Stat. 794, Attach. 13a.

Article III of the Treaty, however, allowed all adult Delawares the opportunity to elect to "dissolve" their relations with the Tribe, to reserve lands allotted them in 1860 from sale under the Treaty, and to become citizens of the United States. 14 Stat. 794, Attach. 12a-13a; J.S. App. 9a. Those Delawares who so chose to alienate themselves from the Tribe received, in exchange for their election, fee simple title to an 80-acre tract of land previously allotted, payment for all improvements made on such land, payment of their just proportion of the cash value of the credits of the Tribe "then held in trust by the United States" (this included proceeds from the sale of the Kansas trust lands), and payment of the individual's proportion of the proceeds from the sales under the 1866 Treaty.

Art. IX, 14 Stat. 796, Attach. 16a-17a; J.S. App. 9a. Article IX of the Treaty further stated that those persons who elected not to remove to Oklahoma but, rather, to become citizens of the United States

> . . . shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

14 Stat. 796, Attach. 17a.

A total of 21 adults and their 49 minor children elected citizenship and expatriation and were registered as having done so as required by Article IX.[2] J.S. App. 9a-10a. The descendants of those Delawares who renounced their tribal relations and remained in Kansas constitute the members of the so-called Kansas "Delaware" class, better named "alien claimants," plaintiffs/appellees in this action. The Tribe thus removed to lands in Oklahoma occupied by the Cherokee Nation and, in 1867, 985 persons were registered there as Delawares. These "registered Delawares" are the ancestors of the appellant Cherokee Delaware class, the modern Delaware Tribe of Indians. J.S. App. 10a.

Removal to Indian Territory was accomplished pursuant to an 1867 agreement between the Delawares and the Cherokees. J.S. App. 10a. In accord with

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[2] Under the treaty terms the minor children of those who elected to stay in Kansas did not immediately become citizens; but, in 1874, Congress declared such persons to be citizens, appropriated funds to pay them their proportionate share of assets held in trust for the Delaware Tribe, and directed the Secretary of the Interior to issue them fee simple title to lands allotted them under the 1866 Treaty. Act of June 22, 1874, ch. 389, 18 Stat. 146, 175, Attach. 21a; J.S. App. 12a.

that contract, each Delaware, using the proceeds from sale of the tribal lands, purchased a life estate in 160 acres of land and the right to become a member and citizen of the Cherokee Nation. J.S. App. 10a-11a. The Indian Claims Commission held, as the basis for all Delaware tribal claims before it, that "the Delaware Indians who removed to the Cherokee territory . . . maintained group identity, receiving annual payments from their own tribal funds, having tribal chiefs and groups and business committees continuously until the present time and at the present time."[3] The District

[3] *Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm'n 253, 260 (1952) (Finding No. 8), *aff'd*, 128 F.Supp. 391, 398 (Ct. Cl. 1955) (finding of fact affirmed, reversed on other grounds.) The Commission, in its Opinion, further elaborated on Finding No. 8:

> It is undisputed that the main body of the Delawares and the group with whom the [United States] dealt as representing the Delaware Nation following the treaty of September 24, 1829, removed to the reservation ceded to the Delawares in Kansas, and that following the agreement of April 8, 1867, this group removed to the Cherokee Territory and its members, or most of them, became incorporated and merged for many purposes with the Cherokees. Nevertheless, this incorporation and merger did not result in the destruction of the continued activities of those so incorporated with the Cherokees as a distinct identity. They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments for many years from their own tribal funds, separate from the Cherokees. They had separate tribal funds in the hands of the U.S. as late as 1906. They were governed by hereditary tribal chiefs until the death of Charles Journeycake in 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group. *Id.* at 265.

Court materially adopted this finding of fact as the basis of its holding that the Cherokee Delawares were entitled to share in the awards in Indian Claims Commission Dockets 337 and 72 and 298, J.S. App. 11a, which the Kansas "Delawares" appealed in Case No. 75-1328. Probable jurisdiction has not been noted in that case. The Delaware Tribe of Indians is today a federally recognized tribe operating under by-laws approved by the Commissioner of the Bureau of Indian Affairs. See Defendants Secretary and Delaware Tribal Business Committee Exh. 25, App. 101.

Congress, in passing the challenged distribution statute, chose as the basis for determining the eligibility of the Delaware Tribe a 1906 Delaware per capita payroll. 25 U.S.C. § 1292 (Supp. IV, 1974). That roll originated in a series of suits, one of which concerned cession of the Kansas "outlet" in 1854, brought by the Delawares pursuant to a special jurisdictional authorization by Congress. Act of July 1, 1902, ch. 1375, § 68, 32 Stat. 716, 726; J.S. App. 13a-14a n.15. In 1904, Congress appropriated funds for the payment of $150,000 in settlement of the pending tribal claims to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . . ." Act of April 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222, Attach. 22a. The Delaware Tribal Council subsequently adopted a resolution declaring that members of the Tribe consisted of those Delawares on the 1867 register and their descendants. App. 90. A subsequent Council resolution authorized the United States to prepare a list of all persons eligible to receive a per capita payment of the settlement fund. See 25 Op. Att'y Gen. 308, 310 (1904).

In the course of this roll's compilation, representatives of the Delaware Tribe requested that the Department of the Interior determine whether any Kansas Delawares were eligible to be included in the payment. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of Jan. 25, 1905, App. 96. The matter was referred by the Secretary to the Comptroller of the Treasury. The Comptroller's decision held that Congress had appropriated funds payable to the Delaware *Tribe* "and that the Delaware Indians who, under the provisions of Articles III and IX of the treaty of July 4, 1866, . . . elected to dissolve their tribal relations and became citizens of the United States, are not legally entitled to be enrolled for participation in the distribution of said sum." 11 COMP. DEC. 496, 501 (1905). Accordingly, the Secretary of the Interior instructed the Union Indian Agency to compile the Delaware payment roll on the basis of the 1867 register and descent therefrom and to exclude those persons who had dissolved their tribal relation and had taken their allotments in Kansas. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of March 22, 1905, App. 96. The roll was completed according to instruction and approved in 1906. *Id.; see* J.S. App. 14a n.15.

History of the Indian Claims Commission Litigation

In 1951, members of the Absentee Delaware Tribe sued in the Indian Claims Commission (Docket No. 337) claiming additional compensation for lands ceded under the St. Mary's Treaty of 1818. J.S. App. 12a. The Commission found the value of the ceded Indiana lands to be far in excess of the lands received in Kansas by the Tribe and awarded $1.63 million "on behalf of

the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." *Absentee Delaware Tribe of Oklahoma v. United States,* 9 Ind. Cl. Comm'n 346 (1961); J.S. App. 12a. The suit had been filed on behalf of *all* descendants of the Tribe.

Funds were appropriated for payment of the judgment, and, in 1968, Congress passed legislation providing for its distribution. 25 U.S.C. §§ 1181-86 (1970). The distribution act provided that one was eligible to participate if his name or that of a lineal ancestor appeared on the 1906 Delaware per capita payroll, the 1940 Absentee Delaware constructed base census roll (or was eligible to be on such roll) or if he was able to show lineal descent from a member of the Delaware Nation as constituted in 1818. 25 U.S.C. § 1181 (1970). Thus the eligibility of the Cherokee Delawares (Delaware Tribe of Indians) was established through the 1906 roll, the Absentee Delawares through the 1940 roll, and the Kansas "Delawares" and others through the "catchall" clause. Distribution of the Docket 337 funds has never been completed owing to conflicting and unwarranted claims, administrative appeals, and the present litigation.

Parallelling the Docket 337 litigation was the Commission's adjudication and judgment of claims in Dockets 72 and 298, the distribution of which is the subject of this appeal. In 1950 and 1951, the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Indians filed claims in the Commission for an accounting under the 1854 Treaty. J.S. App. 15a-16a. The United States conceded it had violated Article 2 of the Treaty by not selling the Delaware trust lands at public auction, and the Commission granted judgment "to the plaintiffs" in the amount of

$9.17 million as of August 31, 1969. Those funds have been appropriated but not distributed.

The distribution act for the Dockets 72 and 298 judgment, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), made eligible for participation those living on the date of enactment whose name, or the name of a lineal ancestor, appeared on the 1906 Delaware per capita payroll or on the 1940 constructed base census roll of the Absentee Delaware Tribe (or was eligible to be on the roll). There was no catchall provision basing eligibility solely on descent from the 1854 Tribe, and the Kansas "Delawares" and others were thus excluded. This distribution statute also differed from the earlier Act in that it provided for payment of 10 percent of the appropriated funds to the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma to be expended or invested for any purpose authorized by the tribal governing body and approved by the Secretary of the Interior. 25 U.S.C. § 1294 (Supp. IV, 1974).

Litigation in the District Court

Appellees filed two suits on behalf of themselves and as representatives of the descendants of the Kansas "Delawares" challenging the constitutionality of their exclusion as a class from distribution of the Docket 72 and 298 funds, the inclusion of the Cherokee and Absentee Delawares in that award, and the inclusion of the Cherokee Delawares in the Docket 337 distribution. J.S. App. 4a. The cases were consolidated and a three-judge court was convened to hear the matter.

The majority of the court held, over a vigorous dissent, that the exclusion of the Kansas "Delawares"

under the terms of 25 U.S.C. § 1292 had no rational basis and thus violated the due process clause of the fifth amendment. J.S. App. 35a-51a, 64a. The court permanently enjoined the Secretary of the Interior from distributing funds pursuant to the statute.

The court unanimously rejected all assertions that the Cherokee and Absentee Delawares were ineligible to participate in the questioned funds.

Appellants Delaware Tribal Business Committee and its members in Case No. 75-1301, the Absentee Delaware Tribal Business Committee and its members in No. 75-1335, and the Secretary of the Interior in No. 75-1495 each appealed the District Court's ruling that the exclusion of the so-called Kansas "Delawares" in 25 U.S.C. §§ 1291-97 was unconstitutional. On June 14, 1976, the Court noted probable jurisdiction of all three appeals.

SUMMARY OF ARGUMENT

Although this case does not arouse passion and emotion as have several the Court has faced in recent years, it presents a grave constitutional question—the proper role of the judiciary under a written constitution creating a government of separated powers. It is fortunate that this serious question arises in a relatively calm, rather than an emotional, setting.

The Court is well aware that there has been debate as to whether federal courts in recent years have failed to restrain themselves to their proper field. In the case at bar the District Court has undertaken to instruct Congress as to how it shall deal with Indian tribes. In so doing it entered a field reserved for the political departments of the Government and, in deciding a due process contention it believed it was at liberty to decide, said it is irrational to draw a distinction between Indian tribes and their members and ordinary American citizens of some degree of Indian descent. In short, it blinded itself to an important distinction or classification that exists under rules of common sense and should not be ignored in constitutional law.

When inferior federal courts assume a general power of superintendence over the executive and legislative branches of the Government, only this Court can correct them and restore the separation and division of powers upon which our Government rests.

ARGUMENT

I. The Claim of Appellees that the Distribution Statute Should Be Reformed To Include American Delaware Aliens as Beneficiaries of an Award for Violation of a Treaty Made Solely for the Benefit of "the Delaware People" Presents a Political, Nonjusticiable Controversy.

Virtually from the establishment of our Government, the problem of dealing with Indians and perhaps compensating them for loss of the use of land they had been occupying has been deemed to be a political question to be handled solely by political branches of the Government and not a case or controversy for resolution by the judiciary. The executive and the legislative branches have tried varying methods of dealing with the problem. This Court has ruled consistently that since the power to administer tribal property, whether land, or money in lieu of the land, is "political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 308 (1902). And if the political branches are believed to have erred "relief must be sought by an appeal to [Congress] for redress, and not to the courts." *Lone Wolf v. Hitchcock,* 187 U.S. 553, 568 (1903).

Before showing the legal force of this doctrine and its application to the treaties and facts here involved it may be instructive to observe, from a practical point of view, what departure from it has meant thus far in this case.

We find the following anomalous situation: The majority of the District Court reasoned that if the

Kansas lands had been sold in 1856 and 1857 at public sale they would, theoretically, have increased the amount of the Delaware trust fund, held by the United States "for the benefit of the Delaware people," by the principal amount of the Indian Claims Commission Award. J.S. App. 45a. Thus, it reasons, each "just proportion" share to be received by Delawares electing American citizenship in 1866 would have been greater. The court then said, as we read its opinion, that any act of Congress distributing the award that does not afford the some 700 alien claimants per capita shares, equal to the per capita shares the present individual Delawares receive, is unconstitutional. The majority ignored the fact that the ancestors of the claimants and the claimants have been solely Americans since 1866, and have accrued no rights *as Delawares* since that date, for they have been aliens to the tribes. If that fact is recognized, the alien claimants, assuming *arguendo* they were entitled to anything, would take only 70 distributive shares because they stand, under American law, *per stirpes* in the shoes of their 70 ancestors who renounced the Tribe. But what the court did, in prying the judiciary into a political matter, was first to evade the prohibition of suits against Indian sovereign bodies by the misuse of a class action to place a tribal asset in jeopardy. Having, by this improper device, intruded into a field which it should not have entered, the court was required to create and impose an ill-fitting melange of American equity and property concepts, mismated with Indian communal practices, to create continuing communal interests for the burgeoning alien claimants in tribal assets from 1866 onward, so that some 700 alien claimants would take 700

shares of a distribution fashioned as the court thinks it should be. And this is done in the name of an 1854 Treaty, a "primary object" of which was to "advance the interests and welfare of *the Delaware people*. . . ." Art. 15, 10 Stat. 1051, Attach. 7a (emphasis added). We have made this prefatory examination to show that judicial intrusion into political matters by evasion of the doctrine of sovereign immunity is not only wrong *per se,* but also does not necessarily produce either legally logical or sound social results.

Treaty commitments of the United States to the Delaware Indian Tribe as a political entity and its members underlie this controversy and control its resolution. The District Court felt that application of the treaties according to their plain terms would work an inequity and therefore, in effect, revised them. However, that matter is nonjusticiable because the courts cannot lawfully reform treaties. The Delaware treaties of 1854 and 1866 (and withdrawals from the Tribe under the latter) demonstrate conclusively that proceeds from the sale of Delaware land were to be paid, or held, solely for the benefit of "the Delaware people" and that the American expatriate Kansas "Delawares," voluntary political aliens to the Tribe since 1866, should not share in the distribution of Delaware tribal property because they have no legal relationship to the Tribe.

This Court has stated that the political question doctrine is a function of the constitutional separation of powers and that, accordingly, a case involves a political question where, *inter alia,* there is found a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*

v. Carr, 369 U.S. 186, 210, 217 (1962).[4] *See also Gilligan v. Morgan,* 413 U.S. 1 (1973).

The power to make treaties, including the power before 1871 to treat with the Indian tribes,[5] is committed under the Constitution to the President and Congress acting jointly. U. S. CONST. art. II, § 2, cl. 2. The supremacy clause makes binding on the judiciary all treaties so made. *Id.* art. VI, cl. 2. Although courts have the power to interpret treaties, *e.g., Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961), it necessarily is limited by the powers vested in the political branches. The power to make treaties, as well as the correlative powers to break, reform, or determine the status of existing treaties, is political in nature. This Court thus has long held, in disputes involving the treaty

[4] A political question is involved and the case is dismissible for nonjusticiability where one or more of the following formulations is "inextricable from the case":

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

[5] Treaties of the United States with Indian tribes have equal status in law with treaties entered into with foreign states. *Morton v. Mancari,* 417 U.S. 535, 552 (1974); *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 242-43 (1872); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-60 (1832). In 1871, Congress foreclosed further treaties with Indian tribes, but left valid and unimpaired existing treaties. 25 U.S.C. § 71 (1970).

relations of the United States, that the courts are bound to adhere, even in the exercise of their interpretive powers, to the principles and constructions established by the political departments. *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 307, 309 (1829). *See also Lone Wolf v. Hitchcock,* 187 U.S. 553, 567-68 (1903).

Consequently, the judiciary cannot in any way annul, disregard, or amend provisions of existing treaties without doing violence to the constitutional separation of powers. *Doe v. Braden,* 57 U.S. (16 How.) 635, 657 (1853); *The Amiable Isabella,* 19 U.S. (6 Wheat.) 1, 71 (1821); *Osage Tribe of Indians v. United States,* 66 Ct. Cl. 64, 80-81 (1928), *cert. denied,* 279 U.S. 811 (1929). It is the duty of the courts to find the intentions of the treating parties and to administer the agreement according to its terms—it is not their province to remake history. *Doe v. Braden, supra,* at 657; *The Amiable Isabella, supra,* at 71; *see DeCoteau v. District County Court,* 420 U.S. 425, 447, 449 (1975).

The rights of modern Delawares and the rights of expatriated Kansas "Delawares," must be determined by the 1854 and 1866 treaties of this country with the Delaware Tribe. In those treaties lie the foundation of the special relationship of the United States to the Indian against which this controversy must be measured. *Morton v. Mancari,* 417 U.S. 535 (1974). The United States did not deal with individuals, but with tribes. *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma,* 220 U.S. 481, 484 (1911). The claim which gave rise to the Indian Claims Commission judgment and award here was based on the violation of treaty

provisions prescribing public sale of tribal lands. J.S. App. 8a-9a. "A primary object of [the treaty was] to advance the interests and welfare of the Delaware people," and it provides clearly that payment for lands ceded thereunder was to be made to the Delaware Tribe. Treaty of May 6, 1854, arts. 15, 3, 10 Stat. 1051, 1049, Attach. 7a, 3a. All moneys arising from land sales pursuant to the Treaty were directed to be paid to the permanent fund of "the Delaware people" to be invested by the President and, from time to time, spent or distributed for the benefit of *"the Delaware people." Id.,* arts. 7, 8, 10 Stat. 1050, Attach. 5a (emphasis added). The plain meaning of the foregoing is that all revenue arising contemporaneously and in the future from the sales consummated pursuant to the 1854 Treaty belonged to the Delaware Tribe and its members and no others.

No other interpretation of the provisions is meaningful in view of the nature of the subject property. The lands sold in 1856-1857 were tribal lands, held communally without individualized rights of ownership, and the proceeds from sales of such lands likewise were tribal property. *Sizemore v. Brady,* 235 U.S. 441, 449 (1914); *Gritts v. Fisher,* 224 U.S. 640, 642 (1912); *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 307 (1902); *Eastern Band of Cherokee Indians v. United States,* 117 U.S. 288, 308 (1886); *Minnesota Chippewa Tribe v. United States,* 315 F.2d 906, 913 (Ct. Cl. 1963). An intent of the parties to treat such proceeds as the property of anyone but the tribe would have been incomprehensible, and the treaty must be interpreted as the Indians would have understood it. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970).

Articles III and IX of the Treaty of July 4, 1866 unambiguously describe the terms by which the original Kansas "Delawares" severed themselves from the Delaware Tribe, forever precluding their classification as "Delaware people" within the meaning of the 1854 Treaty. They clearly and specifically relinquished all future rights in the Tribe's property. 14 Stat. 794, 796, Attach. 16a-17a. The treaties themselves determine the absence of a right in the so-called Kansas "Delawares" to share in Delaware tribal property arising in the present day. *See Eastern Band of Cherokee Indians v. United States,* 117 U.S. 288, 309-12 (1886). That class finds itself distinctly outside the line of succession of tribal treaty rights of which the judgment fund at issue is clearly the culmination.[6]

Arguments below and the opinion of the majority of the District Court suggest that "but for" the treaty violation the Delaware tribal fund would have been greater in 1866 and that the Kansas "Delawares," then taking their *pro ratu* share of tribal assets, therefore, did not receive adequate consideration for their expatriation and severance of tribal rights. J.S. App. 45a. But this line of reasoning is based on speculation alone. Moreover, it ignores the fact that the electing Delawares made their bargain for a sum certain—their "just proportion . . . of the credits of said tribe . . . *then* held in trust by the United States . . . ." Art. IX, 14 Stat. 796, Attach. 16a (emphasis added). No Dela-

[6] Claims under the Indian Claims Commission Act are tribal claims and funds arising from judgments on such claims are regarded as tribal. *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States,* 512 F.2d 1390, 1392 (Ct. Cl. 1975); *Minnesota Chippewa Tribe v. United States,* 315 F.2d 906, 913 (Ct. Cl. 1963).

ware then knew of a judgment to be rendered 103 years in the future.

The foregoing construction of the Delaware treaties is, moreover, the one adopted and acted upon by the legislative and executive branches of Government. Congress in 1904 recognized the Delaware Tribe as successor to the interests created by the 1854 Treaty. Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222, Attach. 22a. The issue of the eligibility of the Kansas "Delawares" to share in Delaware property, derived in part from that Treaty, arose and was decided conclusively against them at that time by the Comptroller of the Treasury, the Secretary of the Interior, the Attorney General, and the Delaware General Council on the basis of their dissolution of tribal relations. 11 COMP. DEC. 496, 500-01 (1905); see discussion at pp. 9-10, *supra*. The Government's distribution of judgment funds to the Tribe thereafter consciously excluded appellees' ancestors as non-Delawares. Such conclusive action by the political branches of Government constitutes a construction of the 1854 and 1866 treaties which is binding on the courts. *Baker v. Carr,* 369 U.S. 186, 212 (1962); *Charlton v. Kelly,* 229 U.S. 447, 474-76 (1913); *Terlinden v. Ames,* 184 U.S. 270, 285-88 (1902); *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 309 (1829).

Nevertheless, the majority below effectively ignored the plain language and intent of material provisions of the treaties and thereby reformed or amended those agreements in order to embrace a legally alien class within the tribal sphere as a function of equal protection of law. In addressing the issue of justiciability, the majority stated that the authority conferred by the

Constitution on the political branches to deal with Indian tribes by treaty was involved only "indirectly" as a historical background to the present controversy. J.S. App. 25a. Their decision thus holds the treaties by which the Delaware claim and award arose as only marginally relevant to the resulting distribution. Such relegation of treaties to the status of "background" is wholly mistaken where the jurisdiction of the Commission and the very nature of the undertaking to resolve Indian claims is premised upon the existence of U. S. treaty obligations.[7]

Likewise, the majority finds that the language of Article IX of the 1866 Treaty, clearly providing on its face that the election of expatriation foreclosed all future right to share in Delaware property, nevertheless did not impel an interpretation that this election

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[7] The Indian Claims Commission is empowered to hear and determine on behalf of any Indian tribe, band, or identifiable group of American Indians:

> (1) claims in law or equity arising under the Constitution, laws, *treaties* of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) *claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant;* and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

25 U.S.C. § 70a (1970) (emphasis added).

constituted a waiver of rights in future judgments.[8] J.S. App. 45a. Such disregard for unequivocal expressions of the parties' intent embodied in existing treaties is untenable. Abrogation of Indian treaty rights is not to be so lightly inferred by the courts. *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-13 (1968); *United States v. Washington,* 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied,* 96 S.Ct. 877 (1976).

The result reached by the District Court is not possible without a constitutionally impermissible exercise in treaty reform, and the controversy, therefore, is political and nonjusticiable. The complaints should have been dismissed.

II. The Distribution of the Indian Claims Commission Award Exclusively to the Federally Recognized Delaware Tribes and Their Members Does Not Deny Due Process of Law to Americans Who Are Descendants of Delaware Indians Who Voluntarily Dissolved Their Relations with the Tribe More than a Century Ago.

A. IF THE MATTER BE DEEMED JUSTICIABLE, THE "RELATIVELY RELAXED" STANDARD OF RATIONALITY IS TO BE APPLIED IN DECIDING WHETHER THE CLASSIFICATION OF DISTRIBUTION TO TRIBAL ENTITIES AND THEIR MEMBERS OFFENDED DUE PROCESS OF LAW.

The District Court, having held that the case was justiciable, decided that the distribution statute denied due process of law because, so it believed, it was irra-

[8] The majority prefers to construe the Treaty liberally in accord with the familiar canon calling for resolution in treaty interpretation in favor of the "weak and defenseless" Indian. This Court recently found this canon inapplicable where parties on both sides of the issue were Indian. *Northern Cheyenne Tribe v. Hollowbreast,* 96 S.Ct. 1793, 1797 n.7 (1976).

tional to exclude American citizens who have no political connection with the Delaware Tribe but are of some degree of Delaware descent from the Tribe of 1854. The District Court announced the test of rationality, but really departed from it in imposing its notions of "equity" in the face of facts showing a clear distinction between the classes included in, and those excluded from, the distribution.

The test of rationality for the determination of the constitutional validity of legislative distinctions and classifications is a "relatively relaxed" one. *Massachusetts Board of Retirement v. Murgia,* 96 S.Ct. 2562, 2567 (1976). We believe it is apparent that the majority erred in concluding that the Government did not have a legitimate interest in legislating specially on behalf of Indian tribes and their citizens and erred also in holding that persons who have no legal connection whatsoever with the Delaware Tribe stand on "equal footing" as to tribal matters with the Tribes and their members.

That the Government has a legitimate interest in preferring Indian tribal members to others in matters pertaining to Indian affairs is established by *Morton v. Mancari,* 417 U.S. 535 (1974). In *Mancari,* a congressional determination to extend Bureau of Indian Affairs hiring preferences to Indian tribal members was unanimously upheld against a fifth amendment challenge. The Court analyzed the preference in the "historical and legal context," *id.* at 553, of the "unique legal status of Indian tribes under federal law and . . . the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes," *id.* at 551. The Court held that since preference for tribal Indians in BIA employment could be

"tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments [would] not be disturbed." *Id.* at 555. *See also Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 96 S.Ct. 1634, 1644 (1976).

The conclusion that descendants of persons who were Delaware citizens in 1856-1857 (the time of the wrong) but renounced that citizenship in 1866 now stand on an "equal footing" with the Tribes and their members can be reached only by ignoring treaties, Indian law, and the existence of the Tribes and substituting therefor the general concepts (a) that the "rationality" of a law is to be determined by what Congress said about it rather than by objective perception of how it operates, (b) that the 1854 Delawares held their property, real and personal, as tenants in common on a per capita basis rather than communally as a Tribe, and (c) that the approximately 700 alien claimants, J.S. App. 4a n.3, stand, not *per stirpes,* in the shoes of their 70 ancestors of 1866, but on per capita parity with present tribal members.

At this writing, we have seen an advance draft of the brief to be filed by the Solicitor General in No. 75-1495. In the interest of conserving the Court's time, we do not repeat, but adopt, the arguments as to rationality therein made as well as those of the minority opinion below. Those documents succinctly answer all claims of lack of rationality, but we think it important here to meet the argument that since Congress apparently was not aware of, or did not have specifically called to its attention, the probable existence of descendants of such alien descendants, their exclusion from distribution was irrational. We suggest this is a *non-sequitur.*

Determination of the validity of a legislative classification is not determined by what the Legislature says in considering the legislation, but by objective standards. "Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to *or perceived by the courts.*" *United States v. Maryland Savings-Share Ins. Corp.,* 400 U.S. 4, 6 (1970) (emphasis added). And at last term this Court said that if a rule excluding aliens from Civil Service employment was expressly mandated by Congress the Court "might *presume* that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Hampton v. Mow Sun Wong,* 96 S.Ct. 1895, 1905 (1976) (emphasis added). Tested under the foregoing rules, the oversight, if it was an oversight, or failure of Congress or some of the proponents of the distribution statute to identify these particular Delaware descendants, would not invalidate the statute. for the widest legal and social differences exist between them and Delaware citizens. Congress was attempting to rectify a breach of a treaty made for the benefit of "the Delaware people." The wide distinction between present "Delaware people" and tribal aliens of some degree of Delaware blood who had been so absorbed in the general citizenry in more than 100 years as to be lost to Indians is clear evidence that these alien descendants no longer were generally regarded as Indians or took part in Indian affairs and were not "considered 'Indians' by the community in which [they live]." *Cf.* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (U. N.Mex. ed. 1942).

B. Distribution of Treaty Judgment Funds to Federally Recognized Tribes and Tribal Members, by the Use of Established Rolls, Rationally Furthers the Obligation of the Federal Government Toward the Indian Tribes.

In *Morton v. Mancari,* 417 U.S. 535 (1974), this Court noted the Government's "trust obligation toward the Indian tribes"[9] and held that an equal protection challenge to legislation that prefers tribal Indians can be analyzed only with considerable deference to the unique relationship between the federal government and tribal Indians, the unique legal status of Indian tribes, and the plenary power of Congress to legislate on behalf of federally recognized Indian tribes. 417 U.S. at 550, 551. The constitutionality of the preference for the Delaware Tribe and Absentee Delaware Tribe can only be considered in this same historical and legal context. 417 U.S. at 553; *see Mathews v. Diaz,* 96 S.Ct. 1883 (1976); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 96 S.Ct. 1634, 1644 (1976).

Indian land is tribal property held by the community for the common benefit of its members; individuals hold no vested rights therein. *United States v. Jim,* 409 U.S. 80, 82 (1972); *Sizemore v. Brady,* 235 U.S. 441, 446, 449 (1914). Accordingly, the Government has never dealt with individual Indians, but only with tribes, and individual Indians enjoy no rights under treaties. *Sac and Fox Indians of the Mississippi in*

[9] 417 U.S. at 541-42. The Court noted that this preference was enacted as part of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* (1970), which also had as its "overriding purpose" the advancement and benefit of Indian tribes and tribal members. *See* 417 U.S. at 542. *See also Fisher v. District Court,* 96 S.Ct. 943, 946 (1976).

Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma, 220 U.S. 481 (1911). The Delaware land sold to the Government in 1854 was tribal property.

This is why the Court of Claims has always held that the ancestral tribe, not the individual lineal descendants of the tribe on a per capita basis, "owned" the claim presented to the Indian Claims Commission. *Turtle Mountain Band of Chippewa Indians v. United States,* 490 F.2d 935, 954 (Ct. Cl. 1974). Thus, since the award in this case supplements the amount paid or put in trust for the Tribe under the 1854 Treaty and settles a tribally owned claim, the award is tribal property. In *Quick Bear v. Leupp,* 210 U.S. 50 (1908), this Court established that the distribution by Congress of such a treaty fund was not a "gratuitous appropriation of public moneys," *id.* at 80, but rather, was an expenditure of "moneys belonging really to the Indians," *id.* at 81.

In exercising its plenary power to administer tribal property, *e.g., Tiger v. Western Investment Co.,* 221 U.S. 286, 311 (1911), Congress enjoys the unquestioned right to specify those who are tribal members for purposes of the distribution of funds, provided they have a relationship to the tribe. *Sizemore v. Brady,* 235 U.S. 441, 447 (1914); *Simmons v. Eagle Seelatsee,* 244 F. Supp. 808, 813 (E.D. Wash. 1965), *aff'd mem.,* 384 U.S. 209 (1966).[10] Congress in this case decided

[10] Congress also may exercise this plenary power to administer tribal property in order to use distribution of judgment funds to effect its national Indian policy or its policy toward specific tribes. *See* F. Cohen, Handbook of Federal Indian Law 341 (U. N.Mex. ed. 1942). For example, it has barred per capita payments from judgments where it wished to restore the tribal estate, *id.; see* Act of Mar. 3, 1931, ch. 401, § 6, 46 Stat. 1487; imposed blood requirements where it wanted to restrict recovery

to follow the usual rule and distribute this tribal property only to the tribes and tribal members and to exclude those who had terminated their tribal membership. *Halbert v. United States,* 283 U.S. 753, 762-63 (1931); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 98-99 (U. N.Mex. ed. 1942).

The Court of Claims has continuously declared that Congress has full power under the Indian Claims Commission Act to decide, under varying circumstances, whether descendants of tribal members at the time of the wrong but who are not currently tribal members should be entitled to participate in any award. *Cherokee Freedmen v. United States,* 195 Ct. Cl. 39, 51 (1971); *Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians,* 355 F.2d 936, 944 (Ct. Cl. 1965). Congress has distributed the vast majority of Indian Claims Commission awards only to the tribes or tribal members.[11]

among certain tribal groups, 25 U.S.C. § 1262 (Supp. IV, 1974); *see Azure v. Morton,* 514 F.2d 897 (9th Cir. 1975); and restricted distribution only to enrolled tribal members, *e.g.,* 25 U.S.C. § 1300e-1 (Supp. IV, 1974). The latter mode of distribution accords with the prevailing federal policy of strengthening Indian tribes and tribal self-government. *See Bryan v. Itasca County,* 96 S.Ct. 2102, 2111 n.14 (1976); *Morton v. Mancari,* 417 U.S. 535, 542 (1974); *see e.g.,* Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* (Supp. IV, 1974).

[11] Congress has used four basic distribution plans, examples of which are set forth below.

In the following statutes distribution was made to the tribal governing body to be spent or invested for purposes authorized by that body (including, at its discretion, per capita distribution) and approved by the Secretary of the Interior:

25 U.S.C. § 594 (1970) (Minnesota Chippewa; any per capita distribution limited to descendants of certain bands who meet requirements of membership in tribe); 25 U.S.C. §§ 647-49 (1970) (Hualapai, unexpended balance); 25 U.S.C. § 676a (1970) (Ute Indians of Utah); 25 U.S.C. § 690 (1970) (Red Lake Chippewa); 25 U.S.C. §§ 786-87 (1970) (Creek, unpaid balance); 25 U.S.C. §§ 881-81a (1970) (Potawatomi); 25 U.S.C. §§ 882-82a (1970) (Sac and Fox); 25 U.S.C. §§ 1031-38 (1970) (Absentee and Eastern Shawnee, distribution to Cherokee-Shawnee based on descent from 1889 tribal roll); 25 U.S.C. §§ 1081-88 (1970) (Quileute and Hoh, unexpended balance); 25 U.S.C. § 1112 (1970) (Miami of Oklahoma, per capita only to enrolled members); 25 U.S.C. §§ 1141-47 (1970) (Oneida, Stockbridge-Munsee, per capita to enrolled Brotherton Indians); 25 U.S.C. § 1171 (1970) (Iowas, any per capita distribution only to those who meet membership requirements); 25 U.S.C. §§ 1271-74 (Supp. IV, 1974) (Jicarilla Apache); 25 U.S.C. §§ 1281-84 (Supp. IV, 1974) (Havasupai); 25 U.S.C. §§ 1300-1300a-4 (Supp. IV, 1974) (Yavapai Apache).

The following statutes prescribe distribution to enrolled members of the modern tribe or persons eligible for enrollment:

25 U.S.C. §§ 565-65g (1970) (Klamath); 25 U.S.C. §§ 581-90c (Supp. IV, 1974) (various Shoshone tribes, also use of historical rolls for Northwestern Band and blood quantum requirements); 25 U.S.C. §§ 1071-73 (Supp. IV, 1974) (Colville); 25 U.S.C. §§ 1161-67 (1970) (Cheyenne-Arapaho); 25 U.S.C. §§ 1191-95 (1970) (Umatilla, various modern membership rolls or eligible for membership); 25 U.S.C. §§ 1201-05 (1970) (Fort Peck Sioux); 25 U.S.C. §§ 1261-65 (Supp. IV, 1974) (Blackfeet, enrolled members; Gros Ventre, membership plus descent from 1937 payment roll and blood requirement); 25 U.S.C. §§ 1300b-1300b-5 (Supp. IV, 1974) (Kickapoo); 25 U.S.C. §§ 1300c-1300c-5 (Supp. IV, 1974) (Yankton Sioux, all who meet membership requirements under 1932 constitution); 25 U.S.C. §§ 1300e-1300e-7 (Supp. IV, 1974) (Assiniboine, enrolled members plus requirements of tribal lineage and blood). Many of the foregoing statutes provide for distribution of up to 25 percent of the fund to the tribe.

The following statutes prescribe distribution to persons who can trace lineal descent from existing "ancient" rolls:

25 U.S.C. §§ 788a-88h (1970) (Creek, various rolls); 25 U.S.C. §§ 871-75 (1970) (Otoe and Missouria, 1906 and 1907 allotment

The crucial fact in this case is that the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma are federally recognized Indian

tribes functioning under governments approved by the Department of the Interior. App. 101-06; J.S. App. 18a-19a n.20. Since the tribal organization of the Delaware Tribe has remained intact, see discussion at pp. 7-9, *supra,* and has been recognized by the political departments of the Government as existing, "they are 'a people distinct from others' . . . ." *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 755 (1867).

In passing the questioned distribution statute, Congress simply followed the Comptroller General's much earlier decision which had excluded these Kansas "Delawares' " ancestors from participation in an appro-

rolls); 25 U.S.C. §§ 883-83d (Supp. IV, 1974) (Osage, 1908 tribal roll, $1 million to the tribe); 25 U.S.C. §§ 911-14 (1970) (Quapaw, 1890 tribal roll but adopted members excluded); 25 U.S.C. §§ 961-67d (1970) (Omaha, 1882 and 1893 allotment rolls plus blood quantum requirement and exclusion of members of other tribes); 25 U.S.C. §§ 991-98 (1970) (Cherokee, 1907 tribal roll); 25 U.S.C. §§ 1051-55 (1970) (Tillamook, 1898 census roll or 1914 annuity payment roll); 25 U.S.C. §§ 1111-21 (1970) (Miami tribes of Indiana and Oklahoma, 1895, 1889, and 1891 tribal rolls; section 1112 provides for distribution to enrolled members only); 25 U.S.C. §§ 1221-27 (1970) (Weas, Piankashaws, Peorias and Kaskaskias, various rolls from 1854 to 1956).

For examples of statutes in which distribution is based solely on descent from a tribe as constituted on a certain date ("catch-all" eligibility) see:

25 U.S.C. §§ 1011-15 (1970) (Snake or Paiute of Oregon, descent from bands whose chiefs signed treaty as long as there is no recovery under other Paiute judgments); 25 U.S.C. §§ 1101-05 (1970) (Nooksack); 25 U.S.C. §§ 1131-35 (1970) (Duwamish); 25 U.S.C. §§ 1151-55 (1970) (Chehalis); 25 U.S.C. §§ 1231-36 (1970) (Chemehuevi); 25 U.S.C. §§ 1241-48 (Supp. IV, 1974) (Pembina Chippewa, excluding members of current Red Lake tribe or those who participated in other awards); 25 U.S.C. §§ 1300d-1300d-9 (Supp. IV, 1974) (Mississippi Sioux Tribes, but distribution to Flandreau Santee Sioux and Santee Sioux of Nebraska based solely on tribal membership).

priation to the Delaware Nation for a settlement under the identical 1854 Treaty. Congress also followed the rule laid down by this Court in *Eastern Band of Cherokee Indians v. United States,* 117 U.S. 288 (1886). There the Court held, among other things, that the Eastern Band's claim to a share of a commuted annuity fund created by the 1835 Treaty of New Echota with the Cherokee Nation had "no substantial foundation." *Id.* at 311. In this treaty, the Cherokees had ceded to the United States all land owned by them east of the Mississippi River and had agreed to remove west of the River. *Id.* at 301. The Cherokees further agreed to commute their permanent annuity to $214,000, to be invested by the United States as part of the general fund of the nation. *Id.* at 302. The New Echota Treaty contained a provision similar to Article IX of the 1866 Delaware Treaty, whereby Cherokees could refuse to remove and become citizens of their state of residence. *Id.* The Cherokees who so elected were the claimants who comprised the so-called Eastern Band.

This Court found the effect of the individuals' decision to remain behind to be clear: "They ceased to be part of the Cherokee Nation. . . ." *Id.* at 303, 309. Thus, it was held, the Eastern Band had no share in the $214,000 commuted annuity fund, even though they had been members of the tribe at the time the fund was created. *Id.* at 311. In reaching this result, this Court relied upon the basic precepts of federal Indian law:

> If Indians . . . in any . . . State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citi-

> zenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds . . . were dedicated by the constitution of the Cherokees, and were intended by the Treaties with the United States, for the benefit of the united Nation, and not in any respect for those who had separated from it and become aliens to their Nation.

Id. at 311-12. These established principles certainly furnish a rational basis for what was done here.

The District Court here questioned the utilization of the existing 1906 and 1940 Delaware rolls as a mechanism for determining tribal membership and participation in the fund. But the 1906 roll on which appellants' eligibility is based has long constituted the measure of Delaware citizenship. That roll was compiled on the basis of the 1867 registration of all Delawares who removed to Oklahoma pursuant to the 1866 Treaty and now provides the best measure of continuity between the Tribe as it existed in 1854 and as it exists today.

Moreover, congressional power to use available tribal rolls for administrative convenience and avoidance of spurious claims is well-settled. In *United States v. Ferguson,* 247 U.S. 175 (1918), this Court held that Congress, for the purpose of restricting alienation of allotments, could declare that the quantum of Indian blood possessed by members of certain tribes be determined by tribal rolls and that any other evidence was inadmissible. Such rolls were found to be "fixed, easily accessible and reasonably reliable . . . ." *Id.* at 178.

This is a case of administrative workability. Congress knew that its 1968 distribution statute has not

yet been executed because of a flood of often erroneous and sometimes fraudulent lineal descendancy claims.

The District Court argued that the statutory criteria were imperfect: Since the Cherokee and Absentee Delawares were required to trace their descendancy to the 1906 and 1940 rolls, respectively, (and, in the case of the Absentee Delawares, to show they were eligible to be on the 1940 roll), administrative convenience and the avoidance of spurious claims were not really furthered. All three classes were "exactly the same." J.S. App. 35a-39a. However, it is reasonable to conclude, as Congress did, that, although perhaps not error-free, it would be far easier and more reliable to require recipients to trace their descendancy to a 32-year-old roll and to a 66-year-old roll than to a Tribe as it existed 118 years ago and which had no contemporaneous tribal roll. The decision reached by Congress was certainly rational. As this Court recognized only last Term, "[p]erfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Board of Retirement v. Murgia,* 96 S.Ct. 2562, 2567 (1976). *See also Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

This Court has recognized that administrative convenience and protection against spurious claims are legitimate governmental interests. *E.g., Weinberger v. Salfi,* 422 U.S. 749 (1975). In *Salfi,* the Social Security Act's exclusion of surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months before his death was held not to violate the equal protection guarantee incorporated in the fifth amendment. *Id.* at 768. As in *Salfi,* the so-called Kansas "Delawares" assert a noncontractual claim which enjoys no consti-

tutionally protected status.[12] *Id.* at 771-72. As articulated by this Court, "[t]he question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.* at 777. *See also Mathews v. Lucas,* 44 U.S.L.W. 5139, 5143 (U.S. June 29, 1976); *Massachusetts Bd. of Retirement v. Murgia,* 96 S.Ct. 2562, 2568 (1976). In view of the chaos caused by the often fraudulent claims which poured into the Bureau of Indian Affairs to claim under the lineal descendancy "catchall" provision in the 1968 Act and because distribution of the earlier judgment fund is not even foreseeable, an appropriate case calling for reasonable governmental restrictions on the ability to share in the judgment is apparent. *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

C. The Legislative History of the Statute at Issue Reflects a Clear Congressional Decision To Exclude Descendants from Members of the Tribe at the Time of Injury Who Are Not Members of the Delaware or Absentee Delaware Tribes.

Congress knowingly excluded nontribal descendants of members of the Tribe as it existed at the time of the wrong. Congress knew that Indian Claims Commission distributions required a basic "policy" decision:

[12] The District Court correctly held that the so-called Kansas "Delawares" have no property or vested right in the Indian Claims Commission award distributed in 25 U.S.C. §§ 1291-97. J.S. App. 61a-62a.

Whether it was preferable to divide the judgment fund among all descendants from members of the 1854 ancestral tribe or to restrict distribution to the modern tribal entity or entities which have succeeded to the ancestral entity's claim and the members thereof. Thus witness the following colloquy between Congressman Edmondson, who had introduced the bill in its original form (H.R. 5200, which included a lineal descendancy "catchall" clause) and later in revised form (H.R. 14267, which eliminated the "catchall"), and Louis Rochmes, attorney for the Delaware Tribe:

> Rep. Edmondson: * * * The [Indian Claims Commission] awards have to be made to the tribal entity or entities, but the Congress must decide how those awards are distributed.
>
> Mr. Rochmes: That is correct, Mr. Chairman.
>
> Rep. Edmondson: And that is a totally different question.
>
> Mr. Rochmes: That is correct. The Congress must decide as a matter of policy. And Congress may say, we will give the award to the lineal descendants of the group.
>
> Rep. Edmondson: And has it often done it that way?
>
> Mr. Rochmes: Has it often—I don't think you have always done it.
>
> Rep. Edmondson: I agree, it has been both ways.

Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 47 (Mar. 13, 1972) (unpublished) [hereinafter cited as *House Hearings*].

Not only did Congress understand the choice it had to make, but also it was sympathetic to the request of

the Delaware and Absentee Delaware Tribes that a portion of the funds be retained for advancement of their members. See the following colloquy:

> Rep. Edmondson: The thing you are interested in is money that can be used for your tribe, for Delawares and the Western Oklahoma Delawares? So that money will be available for educational purposes?
>
> Mr. Townsend [Chairman, Delaware Tribal Business Committee]: Yes, Sir.
>
> Rep. Edmondson: And the purposes of small business?
>
> Mr. Townsend: Yes.
>
> Rep. Edmondson: This is the point you were making?
>
> Mr. Townsend: I conferred with Senator Bellmon yesterday . . . and he mentioned the Alaska Native's bill which they have similar to this . . . . *House Hearings,* at 34.

Congressman Camp voiced this identical theme: "I think it has been expressed by me before the Subcommittee . . . that I feel that one of the most important things we need to do with the distribution of these funds back to our tribes is to retain a portion of them for education particularly, and small business loans, and things of this type whereby that money will be used for this particular benefit. . . . " *Id.* at 39.

Congress knew that the judgment fund distribution enacted four years earlier and ordering distribution to lineal descendants still had not been completed, *e.g., House Hearings,* at 3, and that the Tribes had been injured by this failure, *e.g., House Hearings,* at 9, 16. Congress simply did not believe that all lineal descendants from members of the injured Tribe could be included without occasioning significant administrative burdens.

> Mr. Robert Bruce [of the U.S. Department of Interior]: [W]e want those Munsees or Delawares who can prove their descendancy from the time of the treaties and the wrong at the time of the treaties—they should be given the opportunity to . . . prove that they were there and that they are lineal descendants. Then we believe from our research that there are a few of these people. . . .
>
> Rep. Edmondson: I have a feeling that the language that you proposed that would exclude only those persons whose Delaware ancestry is derived solely from a person who severed his affiliation with the Delaware Nation prior to 1854 is going to present some real administrative problems. *House Hearings,* at 138-39.

Indeed, the very fact that the Kansas "Delawares" were not mentioned in the legislative history indicates only that they long ago renounced the Tribe and have not been remembered. There is no group, organized or otherwise, known as the Kansas "Delawares." There are only individuals who have long become lost in the general citizenry. Their names would not be associated with the Tribe because they have done nothing for the Tribe. A review of the proceedings before the Indian Claims Commission and the Court of Claims would not reveal the name, because the Kansas "Delawares" never appeared in the 25 years of litigation which led to this judgment fund, or in any other litigation affecting the Delawares. Nor have the Kansas "Delawares" ever petitioned Congress in connection with this or any other distribution statute. The Kansas "Delawares" were never heard of or heard from in modern times until they filed suit in 1973, when the chance of obtaining a cash windfall appeared.

The case of the Kansas "Delawares" would present Congress with no special problem. They are simply in the relatively small class of U.S. citizens who can trace some ancestry to the 1856-1857 Delaware Tribe, but who are not tribal members.

CONCLUSION

We respectfully pray that this Court reverse the judgment below and remand the case to the District Court with directions to dismiss the cases.

Respectfully submitted,

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ATTACHMENT

PRINCIPAL TREATIES AND STATUTES

Treaty of May 6, 1854, 10 Stat. 1048

Franklin Pierce,

President of the United States of America:

May 6, 1854

To All and Singular to Whom These Presents Shall Come, Greeting:

Whereas a Treaty was made and concluded at the City of Washington, on the sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-con-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Cha[illegible]s Journeycake; Que-sha-to-wha, or John Ketchem; Pendoxey, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner; they being thereto duly authorized by said tribe; which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded at the City of Washington this sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-con-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Charles Journeycake; Que-sha-to-wha, or John Ketchem; Pondoxy, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner, they being thereto duly authorized by said tribe:

Article 1. The Delaware tribe of Indians hereby cede, relinquish, and quitclaim to the United States, all their right, title, and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, which is described in the

article supplementary to the treaty of October third, one thousand eight hundred and eighteen, concluded, in part, on the twenty-fourth September, one thousand eight hundred and twenty-nine, at Council Camp, on James' fork of White river, in the State of Missouri; and finally concluded at Council Camp, in the fork of the Kansas and Missouri rivers, on the nineteenth October, one thousand eight hundred and twenty-nine; and also their right, title, and interest in and to the "outlet" mentioned and described in said supplementary article; excepting that portion of said country sold to the Wyandot tribe of Indians, by instrument sanctioned by act of Congress, approved July twenty-fifth, one thousand eight hundred and forty-eight, and also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the half-breed Kanzas, forty miles, in a direct line, west of the boundary between the Delawares and Wyandots thence north ten miles, thence in an easterly course to a point on the south bank of Big Island creek, which shall also be on the bank of the Missouri river where the usual high-water line of said creek intersects the high-water line of said river.

ARTICLE 2. The United States hereby agreed to have the ceded country (excepting the said "outlet") surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed—such survey to be commenced and prosecuted as the President of the United States may deem best. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of the public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry, in the same manner that private entries are made of United States

lands; and any, or all, of such lands as remain unsold, after being three years subject to private entry, at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

ARTICLE 3. The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release, and quitclaim to the United States, the said tract of country hereinbefore described as the "outlet." And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing, and selling the same.

ARTICLE 4. The Delaware Indians have now, by treaty stipulation, the following permanent annuities, to wit: one thousand dollars per fourth article of the treaty of third August, one thousand seven hundred and ninety-five. Five hundred dollars, per third article of the treaty of thirtieth of September, one thousand eight hundred and nine. Four thousand dollars per fifth article of the treaty of the third October, one thousand eight hundred and eighteen. One thousand dollars per supplemental treaty of twenty-fourth September, one thousand eight hundred and twenty-nine. One hundred dollars for salt annuity, per third article of the treaty of June seventh, one thousand eight hundred and three. Nine hundred and forty dollars, for blacksmith annuity, per sixth article of the treaty of third October, one thousand eight hundred and eighteen. All which several permanent annuities they hereby relinquish and forever absolve the United States from the further payment thereof; in consideration whereof the United States agree to pay

to them, under the direction of the President, the sum of one hundred and forty-eight thousand dollars, as follows: seventy-four thousand dollars in the month of October, one thousand eight hundred and fifty-four, and seventy-four thousand dollars in the month of October, one thousand eight hundred and fifty-five. The object of converting the permanent annuities into these two payments being to aid the Delawares in making improvements on their present farms, and opening new ones on the land reserved, building houses, buying necessary household furniture, stock, and farming utensils, and such other articles as may be necessary to their comfort.

ARTICLE 5. It is agreed that the sum of forty-six thousand and eighty dollars, being the value of the thirty-six sections of land set apart for school purposes by the supplemental treaty of one thousand eight hundred and twenty-nine, remain for the present at five per cent, interest, as stipulated by the resolution of the Senate of the nineteenth January, one thousand eight hundred and thirty-eight.

ARTICLE 6. The Delawares feel now, as heretofore, grateful to their old chiefs for their long and faithful services. In former treaties, when their means were scanty, they provided, by small life-annuities, for the wants of these chiefs, some of whom are now receiving them. These chiefs are poor, and the Delawares believe it their duty to keep them from want in their old and declining age. It is the wish of the Delawares, and hereby stipulated and agreed, that the sum of ten thousand dollars, the amount provided in the third article as a consideration for the "outlet," shall be paid to their five chiefs, to wit: Captain Ketchem, Sarkoxey, Segondyne, Neconhecond, and Kock-ka-to-wha, in equal shares of two thousand dollars each, to be paid as follows: to each of said chiefs, annually, the sum of two hundred and fifty dollars, until the whole sum is paid: *Provided*, That if any one or more of said chiefs die before the whole or any part of the sum is paid, the annual payments remaining to his share shall be paid to his male chil-

dren, and in default of male heirs, then to the legal representatives of such deceased chief or chiefs; and it is understood that the small life-annuities stipulated for by former treaties, shall be paid as directed by said treaties.

ARTICLE 7. It is expected that the amount of moneys arising from the sales herein provided for, will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary.

ARTICLE 8. As the annual receipts from the sales of the lands cannot now be determined, it is agreed that the whole subject be referred to the judgment of the President, who may, from time to time, prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment, also how much shall be invested, and in distributing the funds to the people, due regard and encouragement shall be given to that portion of the Delawares who are competent to manage their own affairs, and who know and appreciate the value of money; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

ARTICLE 9. The debts of Indians, contracted in their private dealings as individuals, whether to traders or otherwise, shall not be paid from the general fund.

ARTICLE 10. The Delawares promise to renew their efforts to suppress the introduction and the use of ardent spirits in their country and among their people, and to encourage industry, integrity, and virtue, so that every one may become civilized, and, as many now are, competent to manage their business affairs; but should some of them, unfortunately continue to refuse to labor, and remain or become dissipated and worthless, it shall be discretionary with the President to give such direction to the portion of funds, from time to time, due to such persons, as will prevent them from squandering the same, and secure the benefit thereof to their families.

ARTICLE 11. At any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: *Provided,* such assignment shall be uniform.

ARTICLE 12. In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law, shall have a right of way through the reserved lands, on the same terms that the law provides for their location through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right of way, on payment of a just compensation therefor in money.

ARTICLE 13. The Christian Indians live in the country herein ceded, and have some improvements. They desire to remain where they are, and the Delawares are willing, provided the Christian Indians can pay them for the land. It is therefore agreed that there shall be confirmed by patent to the said Christian Indians, subject to such restrictions as Congress may provide, a quantity of land equal to four

sections, to be selected in a body from the surveyed lands, and to include their present improvements: *Provided,* The said Christian Indians, or the United States for them, pay to the Secretary of the Interior for the use of the Delaware Indians, within one year from the date of the ratification of this treaty, the sum of two dollars and fifty cents per acre therefor: *And provided further,* That the provisions of article twelve, in relation to roads, highways, and railroads, shall be applicable to the land thus granted to the Christian Indians.

ARTICLE 14. The Delawares acknowledge their dependence on the government of the United States, and invoke its protection and care. They desire to be protected from depredations and injuries of every kind, and to live at peace with all the Indian tribes; and they promise to abstain from war, and to commit no depredations on either citizens or Indians; and if, unhappily, any difficulty should arise, they will at all times, as far as they are able, comply with the law in such cases made and provided, as they will expect to be protected and their rights vindicated by it, when they are injured.

ARTICLE 15. A primary object of this instrument being to advance the interests and welfare of the Delaware people, it is agreed, that if it prove insufficient to effect these ends, from causes which cannot now be foreseen, Congress may hereafter make such further provision, by law, not inconsistent herewith, as experience may prove to be necessary to promote the interests, peace, and happiness of the Delaware people.

ARTICLE 16. It is agreed by the parties hereto, that the provisions of the act of Congress, approved third of March, one thousand eight hundred and seven, in relation to lands ceded to the United States, shall, so far as applicable, be extended to the lands herein ceded.

ARTICLE 17. It is further stipulated, that, should the Senate of the United States reject the thirteenth article

hereof, such rejection shall in no wise affect the validity of the other articles.

ARTICLE 18. This instrument shall be obligatory on the contracting parties as soon as the same shall be ratified by the President, and the Senate, of the United States.

In testimony whereof the said George W. Manypenny, commissioner as aforesaid, and the said delegates of the Delaware tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

GEORGE W. MANYPENNY, *Commissioner.* [L. S.]

SARCOXEY, his x mark.
NE-CON-HE-COND, his x mark. [L. S.]
KOCK-KA-TO-WHA, his x mark. [L. S.]
QUA-COR-NOW-HA, or James Segondyne, his x mark. [L. S.]
NE-SHA-TO-WHA, or John Ketchem, his x mark. [L. S.]
QUE-SHA-TO-WHA, or John Ketchem, his x mark.
PONDOXY, or George Bullet, his x mark. [L. S.]
KOCK-KOCK-QUAS, or James Ketchem. [L. S.]
AH-LAH-A-CHICK, or James Conner, his x mark. [L. S.]

Executed in the presence of:

THOS. JOHNSON.
CHARLES CALVERT.
DOUGLAS H. COOPER.
WM. B. WAUGH.
HENRY BEARD.
B. F. ROBINSON, *Indian Agent.*
HENRY TIBLOW, *U.S. Interpreter.*

And whereas the said Treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eleventh day of July, one

thousand eight hundred and fifty-four, ratify the same by a resolution in the words following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

July 11, 1854.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at the City of Washington this sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-hon-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Charles Journeycake; Que-sha-to-wha, or John Ketchem; Pendoxey, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner; they being thereto duly authorized by said tribe.

Attest: ASBURY DICKINS, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eleventh day of July, one thousand eight hundred and fifty-four, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this seventeenth day of July in the year of our Lord one thousand eight [L. S.] hundred and fifty-four, and of the Independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State.*

Treaty of July 4, 1866, 14 Stat. 793.

Andrew Johnson,

President of the United States of America,

To All and Singular to Whom These Presents Shall Come, Greeting:

Whereas a treaty was made and concluded at the Delaware Agency, Kansas, on the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-six, by and between Thomas Murphy, John G. Pratt, and William H. Watson, Commissioners, on the part of the United States, and Captain John Connor, Captain Sarcoxie, Charles Journeycake, and other chiefs and councillors of the Delaware tribe of Indians, on the part of said tribe of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:—

Articles of Agreement between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

Whereas Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas; and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas; and whereas the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same; and whereas the Missouri River Railroad Company, a corporation existing in the State of Kansas by the laws thereof,—and which company has built a railroad con-

necting with the Pacific Railroad, from near the mouth of the Kaw River to Leavenworth, in aid of which road the Delawares, by treaty in eighteen hundred and sixty-four, agreed to dispose of their lands,—has expressed a desire to purchase the present Delaware Indian reservation in the said States, in a body, at a fair price:

It is hereby agreed between Thomas Murphy, superintendent of Indian affairs, John G. Pratt, agent for the Delawares, and William H. Watson, special commissioner, who are duly appointed to act for the United States; and Captain John Connor, Captain Sarcoxie, and Charles Journeycake, chiefs, and James Ketchum, James Connor, Andrew Miller, and John Sarcoxie, councillors, duly appointed and authorized by said Delaware Indians to act for them and in their behalf, to wit:—

Article I. That the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee, and Western Railroad Company, according to the terms of a treaty ratified August twenty-second, eighteen hundred and sixty, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof.

Article II. That the Secretary of the Interior shall be, and he is, authorized to sell to said Missouri River Railroad Company, or to other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe in the State of Kansas not previously disposed of, except as hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

ARTICLE III. It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States: and the lands of all such Indians as may elect so to become citizens, together with those of their minor children, held by them in severalty, shall be reserved from the sale hereinbefore provided for. And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty, to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the Secretary of the Interior, when the department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on his new home therein: *Provided,* That whenever it shall be ascertained under the registry above provided for what lands will be vacated, there shall be set apart from the lands held in common, for each child of Delaware blood, born since the allotment of land to said tribe in severalty was made under previous treaties, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain may be made from lands which are to be vacated by those who elect to remove: *And provided further,* That in case there shall be improvements upon any heretofore allotted lands, so selected for children of the Delawares, payment shall be made for such improvements, at their appraised value, by the parents or guardians of said children, at

the same time as if the said lands had been sold to the railroad company or other parties.

ARTICLE IV. The United States agree to sell to the said Delaware Indians a tract of land ceded to the government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

ARTICLE V. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

ARTICLE VI. It is agreed that the proceeds of the sale of the Delaware lands herein provided for shall be paid to said Indians in the manner following, to wit: Whenever the Department of the Interior shall be notified by

the council, through the agent, that any of the Delawares who hold land in severalty are ready to remove, at the same time describing their allotments, there shall be paid to each such person the value of his allotment, and that of his family, to enable him to remove to and improve his new home, provided the money for the said allotment shall have been paid to the Secretary of the Interior; and while said money, or any part thereof, shall remain in the treasury of the United States, the Delawares shall be entitled to receive interest on the amount so retained at the rate of five (5) per cent per annum. And the residue of the proceeds of the sale of the Delaware lands, being those which have not been allotted, or which have once been allotted, but have been abandoned by the allottees, shall be added to the general fund of the Delawares, interest thereon to be paid to the Indians in the same manner as is now provided in regard to that fund.

Article VII. Within thirty days after the ratification of this treaty it shall be the duty of the Secretary of the Interior to give the said Missouri River Railroad Company notice that he is authorized to contract with them or other responsible party or parties for the sale of said lands on the terms specified in this treaty, indicating the approximate quantity thereof; and within twenty days after receiving said notice at their usual place of doing business in the State of Kansas it shall be competent for said company to elect to make the purchase, by filing with the said Secretary their bond, with approved security, in double the amount proposed to be paid by them for the whole of said lands, guaranteeing that they will purchase all of the lands to be sold under the provisions of this treaty, and that they will pay for them in accordance with the terms thereof. And upon the filing of a satisfactory bond as above provided by said company, the contract for such purchase shall be concluded by the said Secretary with said Missouri River Railroad Company, at not less

than two dollars and fifty cents per acre for the whole of the lands herein provided to be sold; *Provided, however,* That if said railroad company shall not within the twenty days above limited file its bond for the purchase as herein prescribed, the Secretary of the Interior may at the expiration of that time accept any offer for the whole of said lands in one body, at not less than two dollars and fifty cents per acre, from any other responsible parties; but no offer shall be considered from other parties than said Missouri River Railroad Company, unless accompanied by a certificate of deposit in the First National Bank of the city of Washington, D.C., to the credit of the said Secretary, for an amount equal to ten per cent of the aggregate value of the land at the price proposed, to be forfeited for the use of the Delawares if the sale should be awarded to said person or corporation so proposing to purchase the lands, and said party should fail to make payment as hereinafter provided.

Article VIII. That within sixty days after the sale of said land shall have been effected, the purchaser shall pay to the said Secretary, in trust for the Delawares, the stipulated price of said unallotted lands, with the appraised value of improvements thereon, excepting therefrom the mill reservation, and the quarter sections upon which the council-house and blacksmith shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the purchaser until possession is delivered; and from time to time thereafter, as often as the Secretary of the Interior shall notify the said purchaser that ten thousand acres or more of said lands have been vacated by said Indians, within three months thereafter, said purchaser shall pay to the Secretary of the Interior, in trust for the said Indians, the stipulated price for said lands, with the appraised value of the improvements; and so on until all are paid for, according to the true intent and meaning hereof; and as said lands shall be paid for,

patents therefor, conveying the same in fee simple, shall be from time to time issued to said purchaser, or to his or its assigns, by the President of the United States.

ARTICLE IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be

entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and in interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

ARTICLE X. It is further agreed that the funds of the Delawares shall never be applied by the government to the payment of the debt or debts of any individual member or members of the nation; nor shall any person be licensed to trade with the Delawares without the consent of the chiefs and council; and the salaries of the chiefs shall henceforward be four hundred dollars per annum.

ARTICLE XI. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights.

ARTICLE XII. It is also agreed that if the said Secretary should not be able to sell the said lands as hereinbefore provided, he may cause the same to be appraised, in separate tracts, at their fair cash value, no tract to be valued at less than two dollars and fifty cents per acre, and the same when appraised may be sold at not less than the appraised value, and for as much more as the same will bring, and the money arising from the sale to be applied and distributed as hereinbefore provided.

ARTICLE XIII. It is agreed by the Delawares that railroad companies engaged in building roads whose routes shall lie through their new reservation in the Indian country shall have a right of way through and over said lands, not exceeding two hundred feet in width for any such road, and also the right to enter on all lands and take and use such gravel, stone, and other material except timber as may be necessary for the construction of such roads, compensation to be made for any damages done in obtaining such material, and for any damages arising from the location or running of such roads to improvements which shall have been made before such road shall have been located, such damages to be ascertained under regulations to be prescribed by the Secretary of the Interior.

ARTICLE XIV. The United States further agree that, in accordance with the general provisions of the sixth article of the Delaware treaty of May thirty, eighteen hundred and sixty, which have not yet been fulfilled, there shall be credited to the Delawares, in the purchase of their new reservation in the Indian country, the sum of thirty thousand dollars, which credit by the United States shall be received by the Delawares as a full settlement of all claims against the government for depredations upon timber to the date of the signing of this treaty; and the Delawares shall receive, without cost, from the United States, land included within their new reservation to the amount of twenty-three sections, in place of the twenty-three sections of half-breed Kaw lands referred to in said sixth section

of the treaty of eighteen hundred and sixty; and inasmuch as the Delaware claim that a large amount of stock has been stolen from them by whites since the treaty of eighteen hundred and fifty-four, the United States agree to have a careful examination of such claims made under the direction of the Secretary of the Interior, and when the value of such stolen stock shall have been ascertained, the same shall be reported to Congress with a recommendation for an appropriation to pay for the same; and all moneys appropriated for such purpose shall be paid to the owners of said stock.

ARTICLE XV. It is also agreed by the contracting parties that nothing contained in this treaty shall be so construed as to require the Delawares to remove from their present homes, until after they shall have selected and received title to lands for new homes elsewhere.

In testimony whereof, the said superintendent, agent, and special commissioner, on behalf of the United States, and the said chiefs and councillors on behalf of the Delawares, have hereunto set their hands and seals this fourth day of July, one thousand eight hundred and sixty-six.

THOS. MURPHY, [SEAL.]
Superintendent.

JOHN G. PRATT, [SEAL.]
Agent.

W. H. WATSON, [SEAL.]
Special Commissioner,

JOHN CONNOR, his x mark, [SEAL.]
Head Chief.

CAPTAIN SARCOXIE,
his x mark, [SEAL.]
Assistant Chief.

CHARLES JOURNEYCAKE, [SEAL.]
Assistant Chief.

JAMES KETCH[U]M, [SEAL.]
JAMES CONNOR, his x mark, [SEAL.]
ANDREW MILLER, his x mark, [SEAL.]
JOHN SARCOXIE, his x mark, [SEAL.]
Councillors.

ISAAC JOHNYCAKE,
U. S. Interpreter.

In presence of—

HENRY S. BULKLEY.
EDWARD S. MENAGER.
LOUIS A. MENAGER.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-sixth day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, by a resolution in the words and figures following to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES
July 26, 1866.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement between the United States and Delaware Indians, made at the Delaware Agency, Kansas, on the fourth day of July, one thousand eight hundred and sixty-six.

Attest: J. W. FORNEY, *Secretary.*

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-sixth of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this tenth day of August, in the year of our Lord one thousand
[SEAL.] eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

ANDREW JOHNSON.

By the President:

HENRY STANBERY, *Acting Secretary of State.*

Act of June 22, 1874, ch. 389, 18 Stat. 146 at 175.

* * *

For this amount, to enable the Secretary of the Interior to pay to the children of the Delaware Indians who became citizens of the United States under the provisions of the ninth article of the Delaware treaty of July fourth, eighteen hundred and sixty-six, and the children of Betsey Zeigler, who died before completing her citizenship under the provisions of said article, their proportionate share of the money and stocks held in trust by the United States for the Delaware tribe of Indians, fifty-four thousand five hundred and fourteen dollars and twenty-three cents, of which twenty-one thousand four hundred and forty-eight dollars and seven cents shall be deducted from the money-credits of said tribe, and thirty-three thousand and sixty-six dollars and sixteen cents, to be taken equitably from their several kinds of stock, shall be transferred to the Secretary of the Treasury and become the property of the United States: *Provided,* That if the Secretary of the Interior shall so determine, the whole amount hereby appropriated shall be taken from the money-credits of the tribe, the Secretary of the Interior to designate the funds from which said amounts shall be taken: *Provided,* That in the case of deceased persons, the Secretary of the Interior shall make

payment to their legal representatives; and said Delaware children are hereby declared to be citizens of the United States, with all the rights, privileges, and immunities of such; and the Secretary of the Interior is hereby authorized and directed to cause patents to issue in fee-simple to said persons for the lands allotted to them; and in case of the decease of any of said persons, the said patents shall issue in the names of such deceased persons, including the said Betsey Zeigler, and the title to the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life; and the Secretary of the Interior shall cause patents to be issued in fee simple in the names of Barbara Zeigler, Martha Zeigler, Samuel Ketchum, Nathan S. Tiblow, and Francis H. Grinter, who belonged to the families of the citizen class, and who died prior to the census of said Indians made by the agent under the provisions of the treaty of July fourth, eighteen hundred and sixty-six, for the lands allotted to them; and the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life.

* * *

Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189 at 222.

* * *

The Secretary of the Treasury is authorized and directed to pay to the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct, the sum of one hundred and fifty thousand dollars in full of all claims and demands of said tribe against the United States, and the same is hereby appropriated and made immediately available: *Provided,* That said sum shall be paid only after the tribal authorities, thereunto duly and specifically authorized by the tribe, shall have signed a writing stating that such payment is in full of all claims and demands of

every name and nature of said Delaware Indians against the United States, which writing shall be subject to the approval of the President of the United States and shall have provided for the discontinuance of all actions pending in all courts wherein said Delaware Indians are plaintiff and the United States defendants.

* * *

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25 U.S.C. §§ 1181-86 (1970)

§ 1181. Distribution of judgment fund; preparation of Indian roll; eligibility

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census role as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States. Applications for enrollment must be filed with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on forms prescribed for that purpose. All applications filed shall be reviewed and a judgment of the eligibility of each applicant will be made and recommendation given in writing to the respective area directors by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission

of names to the Secretary of the Interior for acceptance on the distribution roll. The determination of the Secretary regarding the utilization of available rolls or records and the eligibility for enrollment of an applicant shall be final.

Pub.L. 90-508, § 1, Sept. 21, 1968, 82 Stat. 861.

§ 1182. Division between Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma

There shall be withdrawn from the funds on deposit in the Treasury of the United States to the credit of the Delaware Nation that were appropriated by the Act of October 7, 1964 (78 Stat. 1033), and the interest accrued thereon, using the interest fund first, $7,000, which shall be divided equally between the Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma, and shall be available for claims expenses incurred by the duly authorized personnel of the two tribal groups, as set forth in their joint resolution numbered 4-68 adopted on September 9, 1967.

Pub.L. 90-508, § 2, Sept. 21, 1968, 82 Stat. 861.

References in Text. The Act of October 7, 1964 (78 Stat. 1033), referred to in text, is the Supplemental Appropriation Act, 1965, Pub.L. 88-635. The portion of Pub.L. 88-635 which appropriated the funds referred to was not classified to the Code.

§ 1183. Equal share distribution

After the deduction of attorney fees and expenses, litigation expenses, all costs incident to the provisions of sections 1181-1186 of this title, and to making the payments authorized by sections 1181-1186 of this title, including the cost of roll preparation, which shall be paid by appropriate withdrawals from the judgment fund, the unexpended balance of the funds on deposit in the Treasury shall be distributed in equal shares to those persons whose names appear on the role prepared in accordance with section

1181 of this title. No person shall be entitled to more than one per capita share of the funds.

Pub.L. 90-508, § 3, Sept. 21, 1968, 82 Stat. 862.

§ 1184. Heirs of deceased enrollees

The Secretary shall distribute a share payable to a living enrollee directly to such enrollee. The Secretary shall distribute the per capita share of a deceased enrollee to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary whose findings upon such proof shall be final and conclusive. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests.

Pub.L. 90-508, § 4, Sept. 21, 1968, 82 Stat. 862.

§ 1185. Tax exemption

The funds distributed under the provisions of sections 1181-1186 of this title shall not be subject to Federal or State income tax.

Pub.L. 90-508, § 5, Sept. 21, 1968, 82 Stat. 862.

§ 1186. Rules and regulations

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1181-1186 of this title, including a deadline for filing enrollment applications.

Pub.L. 90-508, § 6, Sept. 21, 1968, 82 Stat. 862.

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25 U.S.C §§ 1291-97 (Supp. IV, 1974)

§ 1291. Disposition of funds

The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298,

and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.

Pub.L. 92-456, § 1, Oct. 3, 1972, 86 Stat. 762.

References in Text. Act of Dec. 26, 1969 (83 Stat. 447, 453), referred to in the text, is Pub.L. 91-166, the Supplemental Appropriation Act, 1970, which was not classified to the Code.

§ 1292. Membership roll requirements

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

(a) they were born on or prior to and were living on October 3, 1972; and

(b) they are citizens of the United States; and

(c)(1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

Pub.L. 92-456, § 2, Oct. 3, 1972, 86 Stat. 762.

§ 1293. Applications for enrollment; filing date and place; notice and appeal of rejections; review

All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972,

and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant.

Pub.L. 92-456, § 3, Oct. 3, 1972, 86 Stat. 762.

§ 1294. Apportionment, credit, and disposition of funds

(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c)(1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided,* That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

Pub.L. 92-456, § 4, Oct. 3, 1972, 86 Stat. 762.

§ 1295. Payments to adults; trusts for minors and persons under legal disability

Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

Pub.L. 92-456, § 5, Oct. 3, 1972, 86 Stat. 763.

§ 1296. Income tax exemption

None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

Pub.L. 92-456, § 6, Oct. 3, 1972, 86 Stat. 763.

§ 1297. Rules and regulations

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title.

Pub.L. 92-456, § 7, Oct. 3, 1972, 86 Stat. 763.

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Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *Appellee*.

No. 75-1335

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

No. 75-1495

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

Appeals from the United States District Court For the Western District of Oklahoma

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September, 1976

UTTENBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	3
History of the Indians Claims Commission Litigation	12
Litigation in the District Court	16
Additions to Statement	18
A. Treaties	18
1854 Treaty between the United States and the Delaware Tribe of Indians (10 Stat. 1018)	18
1860 Treaty between the United States and the Delaware Tribe of Indians (12 Stat. 1129)	18
1866 Treaty between the United States and the Delaware Tribe of Indians (14 Stat. 793)	19
B. Status of Cherokee and Absentee Delawares and Relation of Kansas Delawares to such groups	21
Summary of Argument	28
Argument	31
I. The District Court properly reached the merits of these cases	31
A. Public Law 92-456 (25 U.S.C. §§ 1291-97) providing for the distribution of previously appropriated Indian Claims Commission judgment funds to two statutorily defined classes of fully emancipated, non-ward, non-reservation recipients, without regard to tribal membership or relationship to any existing tribe, is not immunized by the po-	

TABLE OF CONTENTS CONTINUED PAGE

litical question doctrine of Lone Wolf v. Hitchcock, 187 U.S. 553, from constitutional review 31

B. The delegated plenary powers of the executive department may not be arbitrarily exercised to extend recognition as an existing tribe to the fully emancipated and assimilated non-ward lineal descendants of members of the historical Delaware Nation for the purpose of ascribing specially protected constitutional status to legislation affecting that group, where the commonly accepted factual basis for such recognition do not exist 34

C. Assuming, arguendo, that the issue of membership in an Indian tribe, as presented by the Appellants, is a material issue in these appeals, Congress did not statutorily define the membership of Indian tribes by Public Law 92-456 (25 U.S.C. §§ 1291-97) 38

D. This action was a proper rule 23(b)(1)(B) and 23(b)(2) class action. All parties in the District Court stipulated that the action could proceed as a class action. The two alleged tribal groups voluntarily intervened in the action and any sovereign immunity which either of such tribal groups may have had is immaterial 41

II. Public Law 92-456 (25 U.S.C. §§ 1291-99) is void for violation of the due process clause of the Fifth Amendment in that said statute, designating a class of persons to receive Indian Claims Commission judgment funds on a per capita basis, which funds had theretofore been appropriated to satisfy a judgment compensating for a wrong to the historical Delaware Tribe,

TABLE OF CONTENTS CONTINUED PAGE

excludes and invidiously discriminates against a class of persons, the Kansas Delaware class, which stands on an equal footing with the benefited classes 43

A. The legislative purpose to be served by the enactment of the challenged statute was to provide a plan for the distribution of the Indian Claims Commission Dockets 72 and 298 funds to the present representatives of the persons who were wronged in 1854 43

B. In view of the legislative purpose for which the Congress enacted the statute in question, the District Court correctly determined that the challenged statute embodies an invidious discrimination in violation of the due process clause of the Fifth Amendment 47

C. Assuming, arguendo, that the issue of "expatriation," as presented by the Appellants, is a material issue in these appeals, the statutory grant of citizenship to the Kansas Delawares who were minors in 1867 did not result in an "expatriation" of such minors 55

III. When the adult Kansas Delawares resigned from the tribe in 1866 on the express condition that they would be entitled to receive their pro-rata share of the tribal trust fund, their interest in such fund, including any additions thereto for wrongs prior to 1866, became individualized and is a property right which is protected against uncompensated taking by the just compensation clause of the Fifth Amendment 56

Issues Not Presented by These Appeals 59

Conclusion 62

Certificate of Service follows Brief.

TABLE OF AUTHORITIES

STATUTES AND TREATIES: PAGE

25 U.S.C. § 163 ... 40
25 U.S.C. § 177, 1 Stat. 137 ... 37
25 U.S.C. § 601 ... 52
25 U.S.C. § 967(a) ... 52
25 U.S.C. § 1011 ... 52
25 U.S.C. § 1101 ... 52
25 U.S.C. § 1131 ... 52
25 U.S.C. § 1151 ... 52
25 U.S.C. §§ 1181-86, Public Law 90-508 ... 12, 24,39, 51, 52
25 U.S.C. § 1232 ... 52
25 U.S.C. §§ 1291-97 Public Law 92-456 ... 2, 10, 14, 17, 25 26, 27, 38, 39, 40
25 U.S.C. § 1301 ... 35, 41
43 U.S.C. § 189, 18 Stat. 402 ... 8
Treaty of October 3, 1818, 7 Stat. 188 ... 3, 12
Supplemental Article to Treaty of 1818, 7 Stat. 327 ... 3
1854 Treaty, 10 Stat. 1018 ... 18
1860 Treaty, 12 Stat. 1129 ... 18
Treaty of July 4, 1866, 14 Stat. 793 ... 5, 6, 7, 19, 49
Act of June 22, 1874, ch. 389, 18 Stat. 146 ... 49
Act of July 1, 1902, ch. 1375, § 68, 32 Stat. 716 ... 10
Act of April 21, 1904, 33 Stat. 222 ... 11, 21
Wheeler-Howard Act of 1934, 48 Stat. 984 ... 37

CASES:

Absentee Delaware Tribe of Oklahoma v. United States, 9 Ind.Cl.Comm. 346 (1961) ... 12
Baciarelli v. Morton, 481 F.2d 610 (9th Cir. 1973) ... 40
Baker v. Carr, 369 U.S. 186 ... 27, 32, 34-35, 38, 45
Big Eagle v. United States, 323 F.Supp. 60 ... 57

TABLE OF CONTENTS CONTINUED

PAGE

Carrington v. Rash, 380 U.S. 89 ... 53
Cherokee Nation v. Journeycake, 155 U.S. 196 ... 7, 8, 35
Choate v. Trapp, 224 U.S. 665 ... 33, 57, 59
Dandridge v. Williams, 397 U.S. 471 ... 57
Davis v. Littell, 398 F.2d 83 (C.A. 9th 1968), cert. den. 393 U.S. 1018 (1968) ... 36
Delaware Indians v Cherokee Nation, 193 U.S. 127 ... 7, 35
Delaware Tribe of Indians v. United States, 2 Ind. Cl.Comm. 253 (1952), aff'd 128 F.Supp. 391 (Ct. Cl. 1955) ... 8
Elk v. Wilkins, 112 U.S. 94 ... 55
Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971) ... 40
Hallowell v. United States, 221 U.S. 317 ... 55
Helvering v. Gowran, 302 U.S. 238 ... 56
Johnson v. Robison, 415 U.S. 361 ... 35, 47
Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F.Supp. 649 (D.C.N.D. Maine), aff'd 528 F.2d 370 (C.A. 1st 1975) ... 37
Jones v. Meehan, 175 U.S. 1 ... 33, 57, 59
Lane v. Pueblo of Santa Rosa, 249 U.S. 110 ... 33, 57, 59
Lone Wolf v. Hitchcock, 187 U.S. 553 ... 31, 32
McDonald v. Board of Election Commissioners, 394 U.S. 802 ... 47
McGhee v. Creek Nation, 122 Ct.Cl. 380, cert. den. 344 U.S. 856 ... 48, 50
Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (10th Cir. 1957), cert. den. 356 U.S. 960 ... 40
Miami Tribe of Oklahoma v. United States, 281 F.2d 202, cert. den. 366 U.S. 924 ... 57, 59
Montoya v. United States, 180 U.S. 261 ... 35
National League of Cities v. Usery, ... U.S. ..., 96 S.Ct. 2465 ... 33

AUTHORITIES CONTINUED PAGE

Perrin v. United States, 232 U.S. 478 37
Powell v. McCormack, 395 U.S. 486 34

Reed v. Reed, 404 U.S. 71 ..... 47, 53
Richardson v. Belcher, 404 U.S. 78 ..... 35, 47
F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412 47

Shoshone Tribe of Indians v. United States, 299 U.S. 476 ..... 33, 57
Sizemore v. Brady, 235 U.S. 441 ..... 33, 57
Stanley v. Illinois, 405 U.S. 645 53

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 33
Tiger v. Western Investment Co., 221 U.S. 286 33
Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 48

United States v. Creek Nation, 295 U.S. 103 57
United States v. Nice, 241 U.S. 591 55
United States v. Noble, 237 U.S. 74 55
United States v. Powell, 423 U.S. 73 (1975) 57
United States v. Sandoval, 231 U.S. 28 55
United States v. State Tax Commission of Mississippi, 505 F.2d 633 (C.A. 5th 1974) 37
United States Department of Agriculture v. Moreno, 413 U.S. 528 ..... 45, 47

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 47
Weinberger v. Salfi, 422 U.S. 749 47
Weinberger v. Weisenfeld, 420 U.S. 636 45
Williams v. Johnson, 239 U.S. 414 55
Winston v. Amos, 255 U.S. 373 56

MISCELLANEOUS:

11 Comp.Dec. 496, 501 (1905) 11

House Report No. 1466, December 2, 1945, accompanying Indian Claims Commission Act (25 U.S.C. § 20 et seq.) 1946 U.S. Code Cong. Service 44

25 Op. Atty. Gen. 308, 310 (1904) 11

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *Appellee*.

No. 75-1335

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

No. 75-1495

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

Appeals from the United States District Court
For the Western District of Oklahoma

BRIEF FOR APPELLEES

PRELIMINARY STATEMENT

This brief is submitted in answer to the briefs of the Appellants in each of the three above numbered appeals. Where there is a reference to the "Secretary," it shall refer

to the Secretary of the Interior, Appellant in Case No. 75-1495. References to the "Cherokee Delawares" refer to the Delaware Tribal Business Committee, et al., Appellants in Case No. 75-1301. Reference to the "Absentees" refer to the Absentee Delaware Tribe of Oklahoma Business Committee, et al., Appellants in Case No. 75-1335. Citations herein to the Jurisdictional Statement (J.S.) shall be to the Statement of the Cherokee Delawares in Case No. 75-1301. References to the "challenged statutes" shall refer to 25 U.S.C. §§ 1291-97 (Pub. Law 92-456). Reference to the "App." shall refer to the joint Appendix filed by all Appellants in the above numbered cases.

In order that this Court may have for its consideration a single Statement of the Case, we have reproduced the statement as contained in the brief of the Cherokee Delawares with such additions thereto shown in italics as the Appellees assert are necessary for an adequate consideration of the issues. Where deletions are made in such statement, a line striking through the portions which the Appellees urge should be deleted will appear. In addition, the Appellees submit a statement, indexed to the record, which relates to the status of the two alleged "tribal" entities. These additions are offered because of the assertion by all Appellants that the funds in dispute belong to such entities and that the challenged statute defined their membership.

The Appellees also submit a separate addition to the Statement of the Case in which the status of the Appellees as descendants of the minor Kansas Delawares as of 1866 is discussed. This is added for the reason that throughout their briefs, the Appellants refer to the Appellees as "ex-

patriates" from the tribe and representatives of "former" members of the Delaware Tribe who resigned as such members.

STATEMENT OF THE CASE

Originally resident on the eastern seaboard of what is now the United States, the Delaware Nation inexorably was driven westward and became geographically scattered by the early 19th century. J.S. App. 6a.[1] The main body of the tribe by this time lived on lands in Indiana and Ohio. Some Delawares, known as the Munsees, had migrated to New York and Canada. Others had crossed the Mississippi River to occupy land granted them in Missouri by Spain and, later, to move south to Arkansas, Texas and Oklahoma. *Id.* Some descendants of these "southern" Delawares eventually settled in western Oklahoma in 1853 and are the ancestors of the modern Absentee Delaware Tribe. J.S. App. 7a-8a.

Through the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana and Ohio to the United States in exchange for land west of the Mississippi and settled in Missouri where they remained until 1829. J.S. App. 6a-7a. In that year the Delawares signed another treaty, designated as a supplemental article to the Treaty of 1818, whereby the Tribe agreed to accept, as part payment for the Indiana cession, a "permanent" reservation in Kansas. 7 Stat. 327; J.S. App. 7a.

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[1] J.S. App. references are to the opinions of the District Court which appear in the Appendix to appellants' Jurisdictional Statement in No. 75-1301 at pages 1a-87a.

The Delaware Tribe, on May 6, 1854, entered into another treaty with the United States providing for cession of much of the Tribe's Kansas reservation. 10 Stat. 1048, Attach. 1a. Under Aricle 1 of the Treaty, the Delawares retained certain of their residence lands (the "diminished reserve") as a home, but ceded the remainder (the "trust lands") and the "hunting outlet." 10 Stat. 1048, Attach. 1a-2a; J.S. App. 8a. In Article 2, the United States promised to offer the ceded land for sale at public auction with the proceeds from all sales to be paid to the Delaware general tribal fund. 10 Stat. 1048-49, Attach. 2a-3a; J.S. App. 8a. In 1856 and 1857, however, the United States breached the provisions of Article 2 by selling the trust lands without public auction. J.S. App. 8a. As a result, the Tribe received far less from the sale of their lands than it should have—a fact which resulted in the Indian Claims Commission award in Dockets 72 and 298 and enactment of the distribution statute, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974) the constitutionality of which is the subject of this appeal.

The 1854 Treaty further provided that all proceeds from the land sales in excess of the amount necessary to meet current tribal wants would be paid to "a permanent fund [created] for the benefit of the Delaware people" to be invested by the President of the United States, "the interest to be applied annually for the civilization, education, and religious culture of the Delaware people . . . ." Art. 7, 10 Stat. 1050, Attach. 5a. Moreover, Article 8, expressing the parties' recognition that annual receipts from the sale of lands could not be predetermined, provided that:

> ". . . the whole subject be referred to the judgment of the President, who may, from time to time, prescribe

> how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment . . . ; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper."

10 Stat. 1050, Attach. 5a.

In 1866, the Delaware Tribe agreed by treaty to sell the remainder of its Kansas land and to remove to Indian Territory, now Oklahoma. Treaty of July 4, 1866, 14 Stat. 793, Attach. 10a. The United States, in turn, agreed to apply *some of* the proceeds from the sale of the Delaware land to the purchase of 160 acres of land from other tribes in Oklahoma for each Delaware. *The balance of the proceeds were to be added to the general fund of the Delawares.* Art. IV, *VI*, 14 Stat. 794, Attach. 13a.

Article III of the Treaty, however, allowed all adult Delawares the opportunity to elect to "dissolve" their relations with the Tribe, to reserve lands allotted them in 1860 from sale under the Treaty, and to become citizens of the United States. 14 Stat. 794, Attach. 12a-13a; J.S. App. 9a. Those Delawares who so chose to alienate themselves from the Tribe received, in exchange for their election, fee simple title to an 80-acre tract of land previously allotted, payment for all improvements made on such land, payment of their just proportion of the cash value of the credits of the Tribe "then held in trust by the United States" (this included proceeds from the sale of the Kansas trust lands), *except*

the assets now consisting of the funds appropriated to pay Indian Claims Commission Dockets 72 and 298, and payment of the individual's proportion of the proceeds from the sales under the 1866 Treaty. Art. IX, 14 Stat. 796, Attach. 16a-17a; J.S. App. 9a. Article IX of the Treaty further stated that those persons who elected not to remove to Oklahoma but, rather, to become citizens of the United States

> ". . . shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities."

14 Stat. 796, Attach. 17a.

The rights of the minor children of such adults (ancestors of the Kansas Delawares in these cases) were provided for in Article IX of the Treaty of 1866 as follows:

> *". . . all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide guardianship for the protection of his rights and interests and those of his family."*

A total of 21 adults ~~and their 49 minor children~~ elected citizenship and expatriation and were registered as having done so as required by Article IX.[2] J.S. App. 9a-10a. *The names of their 49 minor children who did not so elect but who remained in Kansas were also shown on the register.* The descendants of those Delawares who renounced their tribal relations and remained in Kansas, *who are also descendants of the minor children who remained in Kansas but who did not elect to sever their relations with the tribe,* constitute the members of the so-called Kansas "Delaware" class, ~~better named "alien claimants,"~~ plaintiffs/appellees in this action. *The Delaware Tribe was dissolved, its political government was abandoned except for advisory purposes and those former Delawares who elected to do so* ~~The Tribe thus~~ removed to lands in Oklahoma occupied by the Cherokee Nation and, in 1867, 985 persons were registered there as Delawares. These "registered Delawares" are the ancestors of the appellant Cherokee Delaware class, ~~the modern Delaware Tribe of Indians~~. J.S. App. 10a.

Removal to Indian Territory was accomplished pursuant to an 1867 agreement between the Delawares and the Cherokees. J.S. App. 10a. In accord with that contract, each

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[2] Under the treaty terms the minor children of those who elected to stay in Kansas did not immediately become citizens; but, in 1874, Congress declared such persons to be citizens, appropriated funds *out of the Delaware trust assets* to pay them their proportionate share of *money and stocks* ~~assets~~ held in trust for the Delaware Tribe, and directed the Secretary of the Interior to issue them fee simple title to lands allotted them under the 1866 Treaty. Act of June 22, 1874, ch. 389, 18 Stat. 146, 175, Attach. 21a; J.S. App. 12a. *This Act did not purport to affect the status of such minors as Indians. They did not and could not resign from any Indian tribe since the Delaware Tribe of which they had been members was dissolved and abandoned in 1867. Cherokee Nation* v. *Journeycake,* 155 U.S. 196; *Delaware Indians* v. *Cherokee Nation,* 193 U.S. 127.

Delaware, using the proceeds from sale of the tribal lands, purchased a life estate in 160 acres of land and the right to become a member and citizen of the Cherokee Nation *was purchased by a payment from the trust funds to the Cherokee National fund a proportional amount. Cherokee Nation* v. *Journeycake, 155 U.S. 196.* J.S. App. 10a-11a. *The former Delawares who moved to the Cherokee Nation did so individually and not as a tribe.*

In 1875, Congress enacted the statute appearing at 18 Stat. 402, 43 U.S.C. § 189, which Act, relating to Indians who had resigned from their tribes, provided in part:

> *". . . Provided, That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienations, or incumbrance of any interest he may hold or claim by reason of his formal tribal relations shall be void."*

The Indian Claims Commission held, as the basis for all Delaware tribal claims before it, that "the Delaware Indians who removed to the Cherokee territory . . . maintained group identity, receiving annual payments from their own tribal funds, having tribal chiefs and groups and business committees continuously until the present time and at the present time," *but did not find that they were a tribe.*[3] The

[3] *Delaware Tribe of Indians* v. *United States,* 2 Ind. Cl. Comm'n 255, 260 (1952) (Finding No. 8), *aff'd,* 128 F.Supp. 391, 398 (Ct. Cl. 1955) (finding of fact affirmed, reversed on other grounds.) The Commission, in its Opinion, further elaborated on Finding No. 8:

> "It is undisputed that the main body of the Delawares and the group with whom the [United States] dealt as representing the Delaware Nation following the treaty of September 24, 1829, removed to the reservation ceded to the Delawares in Kansas, and that following the agreement of April 8, 1867, this group removed to the Cherokee Territory and its members, or most of them, became incorporated and merged for many purposes with the Cherokees. Nevertheless, this incorporation and merger did not result in the destruction of the continued activities of those so incorporated with the Cherokees as a distinct identity. They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments for many years from their own tribal funds, separate from the Cherokees. They had separate tribal funds in the hands of the U.S. as late as 1906. They were governed by hereditary tribal chiefs until the death of Charles Journeycake in 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group." *Id.* at 265.

District Court materially adopted this finding of fact as the basis of its holding that the Fifth Amendment did not preclude the inclusion of the Cherokee Delawares ~~were entitled to share~~ in the awards in Indian Claims Commission Dockets 337 and 72 and 298, J.S. App. 11a, which the Kansas "Delawares" appealed in Case No. 75-1328. Probable jurisdiction has not been noted in that case. ~~The Delaware Tribe of Indians is today a federally recognized tribe operating under by-laws approved by the Commissioner of the Bureau of Indian Affairs. See Defendants Secretary and Delaware Tribal Business Committee Exh. 25, App. 101~~. *A constitution for an entity called the Delaware Tribe of Indians was adopted in 1974 and was approved by the Commissioner of Indian Affairs. This was after the challenged statute was passed and after these suits were filed.*

In 1892, the balance of the funds in the Delaware Tribal Trust Fund was distributed to the Registered Delawares (those who removed to the Cherokee Nation). In 1898, all Indians not residing on reservations were declared to be

[3] (Continued)

United States citizens and in 1925, all Indians were made United States citizens.

From 1867 to 1895, when the last chief died, the organization of the Delawares residing in the Cherokee Nation was advisory only, as all such former Delawares were politically Cherokees. After 1895, the only function of the Business Committee was to present claims to the United States on behalf of the Delawares. From 1904 to 1924, no Business Committee functioned and in 1924 it was reactivated. The Chairman of this reactivated Business Committee was Mr. Joseph A. Bartles, a Kansas Delaware, who was Chairman when the suit was filed in the Indian Claims Commission in 1951.

Congress, in passing the challenged distribution statute, chose ~~as the basis for determining the eligibility of the Delaware Tribe~~ a *as one of the bases for eligibility for inclusion on the roll for distribution of the funds from Indian Claims Commission Dockets 72 and 298 that the name of a person, or a lineal ancestor of such person be on the* 1906 Delaware per capita payroll. 25 U.S.C. § 1292 (Supp. IV, 1974). That roll originated in a series of suits, one of which concerned cession of the Kansas "outlet" in 1854, brought by the Delawares pursuant to a special jurisdictional authorization by Congress. *Other suits included claims which involved only the rights of Registered Delawares. In these suits, the Plaintiffs were:*

> *"The Delaware Indians, residing in and being a band of the Cherokee Tribe or Nation."*

Such suits were compromised and settled for a single sum of $150,000. Act of July 1, 1902. ch. 1375, § 68, 32 Stat. 716, 726;

J.S. App. 13a-14a n.15. In 1904, Congress appropriated funds for the payment of $150,000 in settlement of the pending tribal claims to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . . ." Act of April 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222, Attach. 22a. The Delaware Tribal Council subsequently adopted a resolution declaring that ~~members of the Tribe~~ *"the Delaware Tribe of Indians residing in the Cherokee Nation"* consisted of those Delawares on the 1867 register and their descendants. App. 90. A subsequent Council resolution authorized the United States to prepare a list of all persons eligible to receive a per capita payment of the settlement fund. See 25 Op. Att'y Gen. 308, 310 (1904).

In the course of this roll's compilation, representatives of the Delaware Indians requested that the Department of ~~the~~ Interior determine whether any Kansas Delawares were eligible to be included in the payment. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of Jan. 25, 1905, App. 96. The matter was referred by the Secretary to the Comptroller of the Treasury. The Comptroller's decision held that Congress had appropriated funds payable to the Delaware *Tribe* "and that the Delaware Indians who, under the provisions of Articles III and IX of the treaty of July 4, 1866, . . . elected to dissolve their tribal relations and became citizens of the United States, are not legally entitled to be enrolled for participation in the distribution of said sum." 11 Comp. Dec. 496, 501 (1905). Accordingly, the Secretary of the Interior instructed the Union Indian Agency to compile the Delaware payment roll on the basis of the 1867 register and descent therefrom and to exclude those persons who had ~~dissolved~~ *elected to dissolve* their tribal relation

and had taken their allotments in Kansas. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of March 22, 1905, App. ~~96.~~ *98*. The roll was completed according to instruction and approved in 1906. *Id.; see* J.S. App. 14a n.15.

History of the Indian Claims Commission Litigation

In 1951, members of the Absentee Delaware Tribe sued in the Indian Claims Commission (Docket No. 337) claiming additional compensation for lands ceded under the St. Mary's Treaty of 1818. J.S. App. 12a. The Commission found the value of the ceded Indiana lands to be far in excess of the lands received in Kansas by the Tribe and awarded $1.63 million "on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." *Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm'n 346 (1961); J.S. App. 12a. The suit had been filed on behalf of *all* descendants of the Tribe.

Funds were appropriated for payment of the judgment, and, in 1968, Congress passed legislation providing for its distribution. 25 U.S.C. §§ 1181-86 (1970). The distribution act provided that one was eligible to participate if his name or that of a lineal ancestor appeared on the 1906 Delaware per capita payroll, the 1940 Absentee Delaware constructed base census roll (or was eligible to be on such roll) or if he was able to show lineal descent from a member of the Delaware Nation as constituted in 1818. 25 U.S.C. § 1181 (1970). Thus the eligibility of the Cherokee Delawares (Delaware Tribe of Indians) was established through the 1906 roll, the Absentee Delawares through the 1940 roll, and the Kansas "Delawares" ~~and others~~ through the "catchall" clause. Distribution of the Docket 337 funds has never been completed ~~owing to conflicting and unwarranted claims, administrative appeals, and the present litigation~~. *because there were many claims by members of a group known as Munsee Indians who claimed ancestral ties to the historical Delaware Tribe but who had separated from the tribe and joined with other tribes before 1818, the date of the wrong for which the judgment in the Indian Claims Commission Docket 337 was granted. The Bureau of Indian Affairs contended that the Munsees were eligible and encouraged them to file claims. The delays which were granted for the filing of claims by Munsees, the processing of such claims, the contest as to their eligibility, the pendency of a suit brought by such Indians in Kansas, which suit was later dismissed, the administrative appeals and the present litigation all contributed to the delays. The claims of the Munsees were disallowed. The trial court specifically found that none of such delays or problems relating to the payment of Docket 337 involved claims by persons who are members of the Kansas Delaware class. The Kansas Delawares who filed claims were included on the payment roll for Docket 337 without dispute and no contention was made that they were ineligible for any reason.*

Paralleling the Docket 337 litigation was the Commission's adjudication and judgment of claims in Dockets 72 and 298, the distribution of which is the subject of this appeal. In 1950 and 1951, the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Indians filed claims in the Commission for an accounting under the 1854 Treaty *on behalf of the Delaware Nation as it existed in 1854*. J.S. App. 15a-16a. The United States conceded it had

violated Article 2 of the Treaty by not selling the Delaware trust lands at public auction, and the Commission granted judgment "to the plaintiffs" in the amount of $9.17 million as of August 31, 1969. Those funds have been appropriated but not distributed.

The distribution act for the Dockets 72 and 298 judgment, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), made eligible for participation those living on the date of enactment whose name, or the name of a lineal ancestor, appeared on the 1906 Delaware per capita payroll or on the 1940 constructed base census roll of the Absentee Delaware Tribe (or was eligible to be on the roll). There was no catchall provision basing eligibility solely on descent from the 1854 Tribe, and the Kansas "Delawares" and others were thus excluded. This distribution statute also differed from the earlier Act in that it provided for payment of 10 per cent of the appropriated funds to the Delaware Tribe of Indians (an entity to be organized) and the Absentee Delaware Tribe of Western Oklahoma to be expended or invested for any purpose authorized by the tribal governing body and approved by the Secretary of the Interior. 25 U.S.C. § 1294 (Supp. IV, 1974).

The legislative history, including transcripts of the hearings before the Congressional Committees was considered by the trial court. This was because the Appellants contended that the exclusion of the Kansas Delawares by the challenged statute was a deliberate and conscious exclusion which was justified under the facts.

This legislative history shows that the purpose of the change from the criteria which had been used for the distribution of the Docket 337 funds was to exclude the Mun-

see Indians. There was NO consideration given to the fact that by using only the two designated rolls as a criteria for eligibility, the Kansas Delawares would be excluded. At one hearing, the legal representative of the Indians was asked whether, if the two rolls should be adopted without a catch-all clause, any Indian whose ancestors were with the tribe in 1854 would be excluded. He assured the Sub-committee that there would be no such exclusion.

At a Senate Sub-committee hearing, the Chairman of the Business Committee of the "Delaware Tribe of Indians" was asked if there was a tribal roll. He said that the only tribal roll was the list of those persons who had received payments under Docket 337, which of course included the Kansas Delawares.

The trial court properly found that not only was there not a deliberate and conscious exclusion by Congress of the Kansas Delawares but that Congress was unaware that there was such a group being excluded.

After the legislation was adopted and signed by the President, the exclusion of the Kansas Delawares was discovered. The Chairman of the Business Committee sought a conference with legislative representatives to discuss the unintended exclusion. Wanda June Weeks, one of the Appellees herein, sought, through Congressional representatives, relief against the erroneous exclusion. The appeal file of Wanda June Weeks includes correspondence which conclusively shows that the exclusion was an oversight.

The solution to the dilemma of the parties was an administrative construction of the statute to include those who were eligible to be on the 1906 Delaware per capita

payroll but were not. The Chairman of the Sub-committee on Indian Affairs, Committee on Interior and Insular Affairs, House of Representatives, was advised by a letter on May 1, 1973 from the Acting Director of Community Services, Bureau of Indian Affairs, that the Assistant Solicitor, Division of Indian Affairs, Department of the Interior, had issued a memorandum approving the administrative construction solution. Such letter advised that the Area Directors involved were being advised to implement that interpretation of the Act of October 3, 1972 in preparing the roll which would serve as the basis for distributing the judgment funds and that Mrs. Weeks should receive a letter of verification from the Muskogee Area Director. The Congress, therefore, took no action to correct the acknowledged error.

Instead of implementing the administrative construction solution, as Congress had been assured would be done, the claim of Wanda June Weeks was rejected on June 5, 1973 by the Tribal Operations Officer of the Muskogee Area Office of the Bureau of Indian Affairs. She exhausted her administrative appeals on her own behalf and on behalf of 37 members of her close family by an appeal to the Secretary of the Interior. The appeal was denied and the instant suit was filed.

Litigation in the District Court

Appellees filed two suits on behalf of themselves and as representatives of the descendants of the Kansas "Delawares" challenging the constitutionality of their exclusion as a class from distribution of the Docket 72 and 298 funds, the inclusion of the Cherokee and Absentee Delawares in

that award, and the inclusion of the Cherokee Delawares in the Docket 337 distribution. J.S. App. 4a. The cases were consolidated and a three-judge court was convened to hear the matter.

In the course of the litigation the Chairman of the Business Committee of the Delaware Tribe of Indians, who was also its general legal counsel, testified that he did not even learn that any ancestors of the Kansas Delaware class had resigned from the tribe until AFTER this suit was filed.

The majority of the court held, over a vigorous dissent, that the exclusion of the Kansas "Delawares" under the terms of 25 U.S.C. § 1292 *was not intended by Congress*, had no rational basis, *invidiously discriminated against the Kansas Delawares*, and thus violated the due process clause of the Fifth Amendment. J.S. App. 35a-51a, 64a. The court permanently enjoined the Secretary of the Interior from distributing funds pursuant to the statute.

The court unanimously rejected all assertions that the Cherokee and Absentee Delawares were ineligible to participate in the questioned funds.

Appellants Delaware Tribal Business Committee and its members in Case No. 75-1301, the Absentee Delaware Tribal Business Committee and its members in No. 75-1335, and the Secretary of the Interior in No. 75-1495 each appealed the District Court's ruling that the exclusion of the so-called Kansas "Delawares" in 25 U.S.C. §§ 1291-97 was unconstitutional. On June 14, 1976, the Court noted probable jurisdiction of all three appeals.

ADDITIONS TO STATEMENT

A.
TREATIES

In stating the historical background of this case, the Absentees, Appellants in Case No. 75-1335, treat the 1854, 1860 and 1866 treaties in one paragraph without considering them as separate developments in the history of the Delaware people. This does not give this Court a clear statement of the events as they bear on the issues in this case. To clarify this, we discuss these three treaties separately.

1854 Treaty between the United States and the Delaware Tribe of Indians (10 Stat. 1048)

This is the treaty which was breached by the failure of the government to sell lands at auction and which was the basis for the Indian Claims Commission award in Docket 72 and 298. The actual wrongful sales were in 1856 and 1857. At the time of these sales, the lineal ancestors of the Kansas Delawares were members of the tribe and were wronged to the same extent as their fellow tribal members.

The proceeds of the land sales were to be placed in a trust fund for the "Delaware people," not to "go to the Delaware Tribe" as stated on pages 10 and 12 of the Absentees' brief. (Article 8 of Treaty of 1854.)

1860 Treaty between the United States and the Delaware Tribe of Indians (12 Stat. 1129)

The only materiality of this treaty on the issues of this case is the effect it has on the status of the Absentee Delaware class. Article 4 of this Treaty, quoted on page 12

of the Absentees' brief, recognized that there were some Delawares "down among the Southern Indians" and that there was reason to believe that they would return soon. Provision was made for the setting apart for each of them of an 80-acre tract "to be allotted to them as they return" but no mention was made of the then existent Delaware tribal trust fund. Presumably, if they returned and rejoined the tribe, they would share in such fund in common with other tribal members. But, what the Absentees significantly fail to note is that the Absentees are descendants of those who refused to return to the tribe. They did not share in annuities or receive any part of the distribution of the very tribal trust fund which was diminished by the wrong which was the basis for the Indian Claims Commission award which is the subject of this suit.

The status of the Absentees as a class with a legitimate claim to share in the proceeds of such Indian Claims Commission award is the subject of an appeal by these Appellees in Case No. 75-1328.

1866 Treaty between the United States and the Delaware Tribe of Indians (14 Stat. 793)

By this treaty the Delaware Tribe agreed to remove to the Indian Territory *as a tribe*. An election was given to the adults who wished to remain in Kansas to do so and a condition of their resignation of their membership was that they would receive their proportionate part of the tribal assets. It was expressly provided that they would receive their proportionate part of the cash value of the credits of the tribe then held in trust by the United States. This was to exclude such adults from any *future* benefits which the

tribe might receive. The Absentees ask that this be construed to deny them their proportionate part of the claim *then* owned by the tribe for the breach of the 1854 treaty which claim is now represented by the appropriation of funds to pay the Indian Claims Commission award in Dockets 72 and 298.

In Article IX of this treaty it was provided that the minor children, ancestors of present Kansas Delawares, were granted an option to either "remove to his tribe" or to resign from the tribe upon reaching 21 years of age. The government, subsequent to this treaty, entered into a treaty with the Cherokee Nation (14 Stat. 799) under the terms of which the removing Delawares could elect to buy land west of 96° longitude in the Cherokee Nation and retain their tribal status, *or* they could elect to move east of 96° longitude, dissolve their tribe, and each Delaware Indian would become a member of the Cherokee Nation.

An election was made by the Delaware Tribe for its members to move *east* of 96° longitude by an agreement with the Cherokee Nation. The Delaware Tribe was abandoned and dissolved, contrary to the expectation in 1866, and the Delawares moved to the Cherokee Nation as individuals. The minors who remained in Kansas thus had no option available to them when they reached twenty-one years of age to remove to the tribe since under the terms of the Cherokee Agreement, no Indian not on the Registry of 1867 could join the Cherokee Nation.

B.

STATUS OF CHEROKEE AND ABSENTEE DELAWARES AND RELATION OF KANSAS DELAWARES TO SUCH GROUPS

After most of the former Delaware tribal members moved to the Cherokee Nation, they constituted a band and continued to have group identity, maintaining a chief until 1895. Thereafter, they have had only a Business Committee whose only function has been to pursue claims against the United States. Twelve suits were filed by such Cherokee Delawares which resulted in a settlement of $150,000. These suits were filed by the Cherokee Delawares, styling themselves as:

> "The Delaware Indians, residing in and being a band of the Cherokee Tribe or Nation" (Pl. Ex. 18, 19, page 35 of Index, Vol. XXVI of Record).

Congress appropriated the funds to pay the judgment entered for such settlement "to pay to the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct. . . ." Act of April 21, 1904 (33 Stat. 222). Some of the Kansas Delawares had sold their lands in Kansas and had moved to the Cherokee Nation after 1867. The question then arose as to whether they would be entitled to share in the proceeds of the settlement. The Council of the Delaware band contended that they should not share. There was no judicial consideration of the matter but the Comptroller of the Treasury ruled that such funds were for the exclusive benefit of those Delawares who had moved to the Cherokee Nation under the terms of the agreement with the Cherokees in 1867. This result was not inconsistent with the position of the Appellees for the reason that the fund

being distributed was partly to compensate for wrongs committed after 1867 and which were against only the Cherokee Delawares. The payroll of 1906 which was prepared for such payment to Delawares residing in the Cherokee Nation, having been prepared for this specific and limited purpose, was not a roll of the historical Delaware Nation, or of those who were entitled to share for wrongs committed *prior* to 1867. Had it been such, it would have included the Absentees, if their contention in this case is correct.

From 1906 to 1924, the Business Committee of the Delawares became dormant. In 1924, it was reactivated and the Chairman who was elected was Mr. Joseph Bartles, son of Nannie Journeycake Bartles, one of the adult Kansas Delawares who remained in Kansas in 1867. Mr. Bartles served as Chairman until his retirement in 1952 and it was under his leadership that the Indian Claims Commission suits were filed in 1951 (Admissions of Appellants, Pl. Ex. 154, Adm. 51, 52, 54, 55, Vol. XXVII of the Record). When he resigned as Chairman, the General Council passed a resolution in which it recognized that he and other Kansas Delawares were to be considered as members of the group and to be entitled to share in all of its assets (Pl. Ex. 94, p. 36, Vol. XXVII of Record).

In 1958 about 350 persons met as the General Council of the Delaware Tribe of Indians for the purpose of defining the manner "under which the Delaware Tribal Business Committee shall represent, speak and act for the *individual members* of the Delaware Tribe on matters affecting the properties and general business of the Tribe." By-laws were adopted by a resolution providing for the qualification, elec-

tion, terms of office, etc. of the members of the Business Committee. Such resolution expressly reserved all questions of "membership, future membership or the loss of membership" to the Delaware General Council and the Commissioner of Indian Affairs (App. 101). Such By-laws were adopted by a vote of 132 persons (Def. Ch. Del. Ex. 25, Vol. XXIX of Record). In 1974, there were 7,765 Cherokee Delawares (J.S. 39a, n. 36). They were scattered throughout the United States, living in at least 25 states.

There were subsequent meetings of the General Council of the organization which called itself the Delaware Tribe of Indians. Members of the Kansas Delaware class attended, participated in its affairs, and no distinction was made between the Cherokee Delawares and the Kansas Delawares (pages 22-28, Trans. of Hearing on Prel. Inj., Ex. 15, Vol. XXVI of Record).

The United States sought a dismissal of the Indian Claims Commission Delaware claims on the ground that neither of the two groups which had filed the claims were federally recognized tribes. The Indian Claims Commission, and on appeal the Court of Claims, held that they were "groups" within the meaning of Section 70(a) of the Indian Claims Commission Act with standing to pursue the claims on behalf of the historical Delaware Nation.

The Absentees had organized as a separate tribe in 1957 and were thereafter federally recognized as a tribe separate and apart from the Wichita and Affiliated Bands of which they had been a part since 1856. They were not so recognized when the Indian Claims Commission actions were filed.

After judgment in Indian Claims Commission Docket 337, Congress enacted Public Law 90-508 (25 U.S.C. §§ 1181-86) in 1968 for the purpose of distributing an award for a wrong to the Delaware Tribe for the breach of an 1818 treaty. This Act provided that persons who could trace their lineal ancestry to the tribe as it existed in 1818 could qualify for payment. The Kansas Delawares qualified and over 300 of them filed claims which were approved and have been partially paid.

In 1972, after the awards were entered in Indian Claims Commission Dockets 72 and 298 and after an appropriation had been made to pay such awards, Sub-Committee hearings were held in both houses of Congress to consider a distribution statute. The two Indian groups had proposed legislation which provided that the roll for Docket 337 be updated and be used for the payment of Dockets 72 and 298 funds. This would have included the Kansas Delawares. During the course of these Sub-Committee hearings, the problem arose as to how to exclude a group of Munsee Indians whose ancestors had, prior to 1818, been members of the Delaware Tribe, but who had left the tribe and joined with New York Indians and, in common with them, had shared in other Indian Claims Commission awards. Since they were not with the Delaware Tribe in 1854, it was agreed that they were not eligible to share. Upon inquiry of the legal representative of the Delawares in the Indian Claims Commission cases as to whether the adoption of the 1906 payroll (Cherokee Delaware) and the 1940 census roll (Absentee Delaware) as the base rolls for the distribution of the Dockets 72 and 298 funds would exclude any members of the tribe as it existed in 1854, the Congress was

assured that this would not result (J.S. App. 66a-67a). In the Senate Sub-Committee hearings, the Chairman of the Delaware Tribal Business Committee (who is also one of its counsel in these appeals) was asked whether there was a tribal roll of the Delaware Tribe of Indians. He stated that the only tribal roll was the list of those persons who had shared in the Docket 337 funds, which, of course, included the Kansas Delawares. This same Chairman testified in the District Court that the status of the Kansas Delawares was never discussed or considered in the legislative hearings and that he had never read the 1866 Treaty until after this litigation was commenced (pp. 76, 82, Vol. XXXV of Record).

Congress, as is evidenced by the language in 25 U.S.C. § 1294(b), was aware that there was no legal entity known as the Delaware Tribe of Indians. It expressly provided that trust funds were to be withheld by the Secretary until such a legal entity could be formed.

After Congress enacted the challenged statutes, the Kansas Delawares made claims for per capita payments. The Act, in Section 1293, provided that representatives of the two "Oklahoma Delaware groups" were to review the applications. They did so and the applications of the Kansas Delawares were approved by such representatives.

After the Kansas Delaware claims were thereafter disapproved by Bureau of Indian Affairs officials because they could not trace their ancestry to the 1906 payroll of the Delawares residing in the Cherokee Nation, the Chairman of the Sub-Committee on Indian Affairs was notified. Representatives of the two Indian groups met with representa-

tives of the Bureau of Indian Affairs and an agreement was reached that the exclusion of the Kansas Delawares would be solved by an administrative construction by expanding the 1906 payroll to include those persons who qualified to be on such roll but who were not actually listed. Upon receiving such assurance that the problem of the erroneous exclusion of the Kansas Delawares would be so corrected, no amendatory legislation was offered. The Bureau, contrary to this agreement, did not administratively expand the 1906 roll to include the Kansas Delawares, but instead disapproved their applications. Administrative appeals were unavailing and suit was filed by Wanda Weeks in the District Court on August 28, 1973.

In 1974, the Delaware Tribe of Indians approved a constitution for the first time and submitted it to the Commissioner of Indian Affairs for his approval. This constitution defined the membership of the Delaware Tribe of Indians as being those persons "whose lineal ancestors meet the qualifications for participation in the distribution of Indian Claims Commission Dockets 72 and 298 awards, as specifically stated in 25 U.S.C.A. Sections 1292(a), (b) and (c)(1), excluding members of the Absentee Delaware Tribe of Western Oklahoma" (Answer to Interrogatory No. 12, Secretary of Interior, March 4, 1975, Volume III, page 6 of Answer at page 594 of Record). This constitution was approved by the Commissioner on September 30, 1974.

The membership of the Cherokee Delaware group was thus defined in terms of the challenged statute rather than, as asserted by all Appellants, the challenged statute having defined its membership. This "boot strap" effort to exclude

the Kansas Delawares for the first time from such membership after seventy-five years of participation as members of such group was only a self-serving act and should not, we submit, be material to this case. This is a classic example of an attempt to extend such power which this Court noted in *Baker* v. *Carr*, 369 U.S. 186, 216-17, could not be done. This extension of the label "Indian tribe" to cover a Business Committee whose only function is to present claims against the United States on behalf of descendants of the historical tribe who are non-ward, fully assimilated, non-reservation citizens of the United States scattered over at least 25 states, was an arbitrary measure designed to support the position of the Appellants in these cases.

The District Court case was tried on May 27, 1975. The Cherokee Delawares filed a Motion on July 7, 1975, reporting to the District Court that the legal entity known as the Delaware Tribe of Indians had been formed and approved by the Secretary as contemplated by 25 U.S.C. § 1294(b). The District Court declined to approve or disapprove the finding of the Secretary as to such legal entity as "that function is not within our issues or appropriate in our disposition" (J.S. App. 19a, n. 20).

SUMMARY OF ARGUMENT

1. Although the Appellants urge that the constitutional issues litigated and determined in the District Court are non-justiciable, it is clear that the Appellants' reliance upon these threshold arguments is misplaced. Analysis of the "plenary power of Congress in Indian affairs" reveals that that power is not, under the Constitution, unlimited, and that the statute challenged herein enjoys no immunity from review under well-developed Fifth Amendment standards.

The instant case does not involve a political question because, Congress having determined to distribute the judgment funds in question on an individual, per capita basis, the acknowledged—and only permissible—purpose of the legislation under review is to establish with reasonable accuracy a means of payment of the Indian Claims Commission judgment funds to the individuals who trace their ancestry to the historic tribal entity which suffered the wrong for which the Indian Claims Commission judgment seeks to compensate.

Given the judicial history of the Delaware claims, and the legislative history of the statute in question, it is likewise clear (assuming, arguendo, that the Cherokee Delawares and the Absentee Delawares are "tribes," as that term is used in cases in which legislation dealing with Indian tribes is held to be substantially immune from review) that the funds designated for distribution by the challenged statutes are not "tribal funds" and that in enacting this legislation, Congress was not making a present policy determination as to the means of discharging the

guardianship responsibilities of the federal government with respect to any existing tribe.

Moreover, the two groups styling themselves as tribes lack the factual attributes necessary to preclude review of legislation dealing with them or their "members"—and it is clear that a group may not be arbitrarily labeled as an "Indian tribe" for the purpose of erecting an extraordinary shield from review with respect to legislation dealing, *in part*, with fully emancipated individual citizens of fractional Indian blood who are asserted to be members of the "tribe."

The Appellants' objection to the use of the class action procedure is wholly without merit because the record clearly reflects (1) that all parties agreed that the action in the District Court should proceed as a class action; (2) that the two organizations as to which "tribal immunity" is urged were not sued in these actions in the District Court, but voluntarily intervened therein; (3) that the funds distributed to individuals, per capita, by the challenged statute are not tribal funds; and (4) the District Court granted no relief against any tribe or tribal organization.

2. The challenged statute violates the Due Process clause of the Fifth Amendment and is therefore void. Applying well-developed and familiar standards of Fifth Amendment review, it is clear that the Kansas Delawares stand on an equal footing with the designated beneficiaries of the Indian Claims Commission judgment in question and that no rationale exists or has been offered to justify their exclusion from participation in the judgment funds. It is abundantly clear from the record that the original adult

Kansas Delawares resigned from the tribe on the express condition that they would share in the assets now represented in part by the Dockets 72 and 298 judgment funds. Moreover, it is equally clear, on the "expatriation" issue, that the minor Kansas Delawares, from whom the present-day Kansas Delawares are also directly descended, never resigned from the Delaware Tribe. The argument that considerations of administrative convenience justify the exclusion of the Kansas Delawares is wholly fallacious because the Kansas Delawares (as is also the case as to the classes included in the subject statute) trace their ancestry directly to a specific roll prepared by the federal government—there is and was no need for a "catch-all" category to include the Kansas Delawares; consequently, time consuming resort to uncertain ethnological or tribal data is unnecessary in order to determine the claims of judgment fund applicants claiming as Kansas Delawares.

The subject statute is also violative of the Just Compensation clause of the Fifth Amendment in that the statute, by directing that the Dockets 72 and 298 funds be paid other than to the Kansas Delawares, purports to mandate a taking of the Kansas Delawares' individualized compensable interest with respect to those funds.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY REACHED THE MERITS OF THESE CASES.

A.

Public Law 92-456 (25 U.S.C. §1291-97) providing for the distribution of previously appropriated Indians Claims Commission judgment funds to two statutorily defined classes of fully emancipated, non-ward, non-reservation recipients, without regard to tribal membership or relationship to any existing tribe, is not immunized by the political question doctrine of Lone Wolf v. Hitchcock, 187 U.S. 553, from constitutional review.

The Appellants urge that the doctrine as announced in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565, and consistently followed by the courts prevents judicial review of the challenged statute. That rule is:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

The District Court acknowledged the limitations on its authority by virtue of this long-established rule but found that the subject statutes do not present policy determinations of the sort involving the treaty-making function, as was involved in the *Lone Wolf* case, and that the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress (J.S. App. 25a, 26a). The District Court noted that:

"'[T]he power of Congress over Indian affairs may be of a plenary nature, but it is not absolute.' United States v. Tillamooks, 329 U.S. 40, 54; see also United States v. Klamath Indians, 304 U.S. 119, 123; Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375-76; United States v. Creek Nation, 295 U.S. 103, 109-10; Stephens v. Cherokee Nation, 174 U.S. 445, 578; F. Cohen, Handbook of Federal Indian Law 91 (orig. ed. 1942)." (J.S. 26a)

The District Court noted that these recent enactments deal with equitable distribution following a judicial award, and with proper classifications for the distribution (J.S. App. 25a).

This case is therefore distinguishable from those cases which reiterate the *Lone Wolf* doctrine. Since the relations between the government and the Indians over which it presently exercises its guardianship function is not involved in the distribution of funds to compensate for a historic wrong, on a per capita basis, to a class of persons who are non-ward Indians with no relation to tribal entities, there is no political question which limits the Court's review of whether the challenged classifications meet the constitutional standards of rationality.

The Absentees somewhat audaciously argue that the District Court held that this Court in *Baker* v. *Carr, supra*, overruled, *sub silento*, the *Lone Wolf* case. It is clear that the District Court acknowledged the present applicability of the doctrine of the *Lone Wolf* case in those cases where political and discretionary functions are involved (J.S. App. 25a).

This Court has held that even in the management of real property belonging to a tribe, to which the United

States held legal title, and the tribe had only the right of occupancy, the Fifth Amendment prohibition against taking property without just compensation prevented the government from allowing another tribe to appropriate a portion of such land to its own use, and from confirming or making permanent the encroachment by one tribe on the reservation of another tribe. *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476.

In the case of *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, it was held that the Secretary of the Interior could be enjoined from "offering, listing or disposing" of tribal lands as public lands of a tribe which was under guardianship.

This Court said, in the case of *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-78:

"Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the land permanently, compensation must be paid for subsequent taking."

From these cases and those cited by the District Court (J.S. App. 26a) constitutional limits on plenary control of *tribal* property held in common become plainly apparent. The rights of individual Indians have likewise been held to be subject to constitutional protection. *Sizemore* v. *Brady*, 235 U.S. 441; *Jones* v. *Meehan*, 175 U.S. 1; *Choate* v. *Trapp*, 224 U.S. 665; and *Tiger* v. *Western Investment Co.*, 221 U.S. 286.

There is no problem of lack of discoverable and manageable standards for resolving the questions presented, or an impossibility of decision without an initial policy determination of a kind clearly for non-judicial discretion, see

Baker v. *Carr, supra; Powell* v. *McCormack,* 395 U.S. 486, 518-19, and it is clear that "Congressional enactments which may be fully within tne grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the . . . Due Process clause of the Fifth Amendment . . ." *National League of Cities* v. *Usery,* ... U.S. ..., 96 S.Ct. 2465 at 2469.

Since this case involved only a determination of whether there was a sufficient rational basis to support the invidious discrimination against the Kansas Delaware class, and no "political questions" were involved, the District Court, under the above cited cases, correctly reached and decided the constitutional issues presented by the Complaints of the Appellees.

B.

The delegated plenary powers of the executive department may not be arbitrarily exercised to extend recognition as an existing tribe to the fully emancipated and assimilated northward lineal descendants of members of the historical Delaware Nation for the purpose of ascribing specially protected constitutional status to legislation affecting that group where the commonly accepted factual bases for such recognition do not exist.

In *Baker* v. *Carr,* 369 U.S. 186, 216-17, this Court, after noting the plenary power of Congress and the long-established policy of the government to determine for itself when the guardianship status of a tribe should cease to exist, said:

> "While '"It is for [Congress] . . . , and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tute-

> lage" . . . , it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe. . . .' United States v. Sandoval, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107. Able to discern what is 'distinctly Indian,' ibid., the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."

The Delaware Tribe was abolished and abandoned and its political organization was dissolved in 1867. This Court so held over eighty years ago. *Delaware Indians* v. *Cherokee Nation,* 193 U.S. 127, 134-35, and *Cherokee Nation* v. *Journeycake,* 155 U.S. 196, 205.

From that time to the time the challenged statute was enacted, the "tribe" was nothing more than a Business Committee whose function was to present claims against the government. (See summary of evidence on pages 25-31 of the Plaintiff's Proposed Findings of Fact at Vol. XXIII of the Appeal Record.)

Legislation cannot be immunized from judicial scrutiny by a label applied to the subject matter. *Richardson* v. *Belcher,* 404 U.S. 78, 81. Nor can a discrimination be rationalized by the application of a label to a class of beneficiaries. *Johnson* v. *Robison,* 415 U.S. 361, 377-78.

This Court, in *Montoya* v. *United States,* 180 U.S. 261, 266, stated:

> "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . ."

The Congress defined an Indian tribe in the Constitutional Rights of Indians Act, 25 U.S.C. § 1301, as follows:

> "(1) 'Indian tribe' means any tribe, band or other group of Indians subject to the jurisdiction of the United States and *recognized as possessing powers of self-government.*" (Emphasis added.)
>
> "(2) 'powers of self-government' means and includes all government powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies and tribunals by and through which they are executed, including courts of Indian offenses. . . ."

The group known as the Delaware Tribe of Indians (Cherokee Delawares) was not a tribal entity within the scope of the plenary power of Congress. (See pages 21-23 *supra.*) The late "recognition" of this group as a tribe for the purpose of administering 10% of the Dockets 72 and 298 funds was, we submit, but an arbitrary designation of such group as a "tribe" when, in fact, there was no semblance of the long-recognized indicia of tribal existence. *Cf. Davis* v. *Littell*, 398 F.2d 83 (C.A. 9th 1968), *cert. den.* 393 U.S. 1018 (1968), in which, although the status of Indian tribes was said to be "an uncertain one today," *Id.* at 84, the Court, in holding that the general counsel for the Navajo Tribe was, acting as such, immune from suit for defamation, relied heavily on the Navajo Tribe's numerous attributes of self-government and tribal infrastructure. The organizations involved in the cases at bar lack these attributes.

This Court has held that an arbitrary designation of a non-tribal group as an Indian tribe does not bring the relations with such group under the plenary powers of Congress

and immunize such group and such relations from the judicial processes.

The lower courts have recognized that whether a group is in fact an Indian tribe does not depend on whether there has been any federal "recognition" of such group as a tribe but rather whether the status of such group qualifies it to be considered a tribe with the historical attributes of such entities.

In *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 388 F.Supp. 649 (D.C.N.D. Maine 1975), *aff'd* 528 F.2d 370 (C.A. 1st 1975), it was held that the Passamaquoddy Tribe was an Indian tribe within the meaning of the Indian Nonintercourse Act, 1 Stat. 137, 25 U.S.C. § 177, even though the federal government had never given such tribe recognition.

In *United States* v. *State Tax Commission of Mississippi*, 505 F.2d 633 (C.A. 5th 1974), it was held that a band of Choctaw Indians, though organized under the Wheeler-Howard Act of 1934, 48 Stat. 984, and given full recognition by the Bureau of Indian Affairs as an existing Indian tribe, were nevertheless not an Indian tribe.

In *Perrin* v. *United States*, 232 U.S. 478, 486, this Court sustained the power of Congress to regulate the sale of intoxicating liquor on Indian land and, in reference to the plenary power of Congress, said:

> "As the power is incident only to the presence of the Indians and their status as wards of the government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis.

> Thus, a prohibition like that now before us, if covering an entire state when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when, in regular course, the Indians affected were completely emancipated from Federal guardianship and control."

The act of the Secretary in recognizing the Cherokee Delawares as an Indian tribe did not make them a tribe within the meaning of Article I, Sec. 8, Cl. 3 of the Constitution. This would be but an arbitrary extension of such power of the kind condemned in *Baker* v. *Carr, supra.*

C.

Assuming, arguendo, that the issue of membership in an Indian tribe, as presented by the Appellants, is a material issue in these appeals, Congress did not statutorily define the membership of Indian tribes by public law 92-456 (25 U.S.C. §1291-97).

It is argued by the Appellants that Congress intended by the challenged statute to define the membership of the Delaware Tribe of Indians and the Delaware Tribe of Western Oklahoma by the provisions relating to the criteria for per capita payments.

Congress did not provide that the 90% of the funds designated for individual, per capita distribution were to be paid to or through any tribal entity and there is no language in the statute which indicates that the membership of any tribal group was defined by the Act.

In adopting the 1940 base census roll (25 U.S.C. § 1291 (c)(2)) as one of the criteria for eligibility, Congress imposed no requirements as to blood quantum. The constitution of the Delaware Tribe of Western Oklahoma limits membership in the tribe of persons 1/8 or more Delaware blood (J.S. App. 48a, n. 40).

Likewise, in adopting the 1906 per capita payroll as one of the criteria for eligibility Congress imposed no requirement as to tribal affiliation and there were many members of the Delaware Tribe of Indians whose ancestors were not on the 1906 payroll (Exhibit 94, Vol. XXVII of Record).

Persons who have no connection with either tribal group were, under the express terms of the Act, declared eligible to share and it is clear that, as to the Delaware Tribe of Indians, the Congress did not recognize such group as an existing tribal entity. The 10% of the funds apportioned to the "Delaware Tribe of Indians" was to be held by the Secretary in trust pending the organization of a legal entity to receive those funds. 25 U.S.C. 1294(b) (Proviso).

The Delaware Tribe of Indians adopted a constitution after the challenged statute was enacted and *after* this suit was filed in which it attempted to define its own membership in *the exact terms of the challenged statute*. Prior to that time, the "tribal" roll consisted of the persons whose applications were approved to share in the Indian Claims Commission Docket 337 funds pursuant to another distribution statute, 25 U.S.C. §§ 1181-86. The prior statute could just as reasonably be read to have "statutorily defined membership" and the Kansas Delawares were included.

On page 23, note 23, of his Brief, the Secretary cites nine distribution statutes which he says provided for distri-

bution either to tribes or their members. None of these statutes provided for distribution to tribal entities but each did provide for distribution to *members of existing tribes.* In those instances in which Congress intended that the distribution be made to tribal members only, it said so. The difference between the challenged statute and the statutes cited in such footnote is noteworthy. There is no language in the challenged statute which is comparable to the language in the cited statutes.

In referring to the Committee to review each application, it is significant that the reference was not to representatives of tribes but was to "representatives of the two Oklahoma Delaware *groups.*" 25 U.S.C. § 1293.

Indian tribes have been recognized as having the sole authority to define their own membership except that the Secretary may define membership for the purpose of receiving federal funds. 25 U.S.C. § 163; *Martinez* v. *Southern Ute Tribe of Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957), *cert. den.* 356 U.S. 960; *Fondahn* v. *Native Village of Tyonek,* 450 F.2d 520, 522 (9th Cir. 1971); and *Baciarelli* v. *Morton,* 481 F.2d 610 (9th Cir. 1973).

There is no suggestion in any of the cases that persons included in a roll for such payment become members of an Indian tribe for any other purpose.

In this case, it was not indicated that Congress intended to define tribal membership even for the purpose of the distribution of the Dockets 72 and 298 funds since payment was not made to tribal members but rather to individuals on a descendancy basis and no reference to tribal affiliation was required.

Moreover, if the Delaware Tribe of Indians was an Indian tribe as defined by Congress in the Indian Constitutional Bill of Rights Act, 25 U.S.C. § 1301 *et seq.*, the Kansas Delawares were members of such tribe. An adoption of a constitution in 1974 which defined membership in such manner that the Kansas Delawares would be excluded without according them the procedural safeguards of the Constitutional Rights of Indians Act would have been a violation of their rights under the terms of that Act (25 U.S.C. § 1301 *et seq.*).

The legislative history of the challenged statute is totally devoid of any indication that tribal membership was being considered or being defined.

D.

This action was a proper rule 23(b)(1)(B) and 23(b)(2) class action. All parties in the District Court stipulated that the action could proceed as a class action. The two alleged tribal groups voluntarily intervened in the action and any sovereign immunity which either of such tribal groups may have had is immaterial.

The Absentee Delawares argue that the District Court erred in employing the class action device in this suit, asserting that its use was a "sleight of hand" to avoid the sovereign immunity of the "tribe."

At the pre-trial hearings, the Absentees expressly agreed that the case could proceed as a class action. (See page 70, Transcript of Pre-Trial Conference, February 28, 1974; and pages 18, 95 and 100, Transcript of Pre-Trial Conference, March 5, 1974, Volumes XXXIII and XXXIV of Record.)

On February 11, 1974, the Plaintiffs filed a formal verified motion for an order directing that the action proceed as a class action, describing the Kansas Delaware class by the name of each ancestor, and describing the Cherokee Delaware and Absentee Delaware classes (App. 26). The Secretary and the Absentee Delaware class filed a response on February 21, 1974 (page 91, Volume I of Record) which was on behalf of the "Delaware Tribe of Western Oklahoma, designated by plaintiff in the Complaint as Absentee Delaware Tribe of Oklahoma Business Committee" and the individual representatives of the Absentee class. In this response, it was stated that these parties had no objection to the case proceeding as a class action so long as there was a limitation on the membership of the Plaintiff class and alleged that "[t]he defined members are identifiable class for utilization of Rule 23(b)(3), Federal Rules of Civil Procedure."

In a motion to dismiss the action filed April 9, 1974, the Absentee class raised the question of tribal immunity but no objection was ever raised in the District Court by the Absentee class or the tribe to the use of the class action device, but they, in fact, approved the class action procedure.

The Weeks case and the Frazier case (both filed by Kansas Delawares) were consolidated by Order filed April 22, 1974 (Volume VII of Record, page 1194). On May 22, 1975, the "Absentee Delaware Tribe of Western Oklahoma Business Committee, and the individual members thereof on behalf of the Absentee Delaware Tribe of Western Oklahoma" filed a motion for leave to intervene in the Frazier

case (Volume IX of Record, page 1705) and on the same day an Order was entered granting intervention (Volume IX of Record, page 1710). The tribal entity was thus a party to the case in its own right and upon its own motion.

The District Court granted no relief against the tribes or their tribal authorities as such and ordered that the judgment not be construed as a binding adjudication affecting them (J.S. App. 23a).

II.

PUBLIC LAW 92-456 (25 U.S.C. §§1291-97) IS VOID FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IN THAT SAID STATUTE, DESIGNATING A CLASS OF PERSONS TO RECEIVE INDIAN CLAIMS COMMISSION JUDGMENT FUNDS ON A PER CAPITA BASIS, WHICH FUNDS HAD THERETOFORE BEEN APPROPRIATED TO SATISFY A JUDGMENT COMPENSATING FOR A WRONG TO THE HISTORICAL DELAWARE TRIBE, EXCLUDES AND INVIDIOUSLY DISCRIMINATES AGAINST A CLASS OF PERSONS, THE KANSAS DELAWARE CLASS, WHICH STANDS ON AN EQUAL FOOTING WITH THE BENEFITTED CLASSES.

A.

The legislative purpose to be served by the enactment of the challenged statute was to provide a plan for the distribution of the Indian Claims Commission Dockets 72 and 298 funds to the present representatives of the persons who were wronged in 1854.

The constitutional principles herein discussed do not, of course, take on meaning in the case at bar unless they are applied to the facts. Appellees invoke the Due Process and Just Compensation clauses of the Fifth Amendment.

In applying the relevant Due Process principles to the facts, Appellees submit that the critical step should be to determine the "legislative object" in enacting the judgment legislation in question.

The judgment legislation in question is plainly not welfare legislation. There is nothing in the appropriation acts, in the distribution statutes or in the legislative history to suggest this. What the Committee testimony does reveal is that the only congressional purpose in enacting this legislation was to define the classes of ultimate recipients of the funds so as to include the present-day representatives of the persons who were wronged in 1854 (J.S. App. 66a-67a). This purpose is consistent with prior claims litigation and judgment legislation and is supported by purpose and legislative history of the Act under which the claims in Dockets 337, 72 and 298 were brought to judgment:

> "And so the present generation of Indians is entitled to claim the funds that were set aside in trust for them, in place of the lands that they would own today if these transactions had never been consummated." House Report No. 1466, December 2, 1945, accompanying the Indian Claims Commission Act (25 U.S.C. §§ 20 *et seq.*), 1946 U.S. Code Cong. Service p. 1347.

When the matter is viewed against the background of the purpose of the Indian Claims Commission Act, and the *nature of the rights adjudicated* in the Indian Claims Commission, including particularly the nature of the rights adjudicated in Dockets 337, 72 and 298, it becomes manifest that the *only* valid or permissible legislative object in passing judgment legislation is to define the ultimate recipients

of the funds as described above. The matter might be different if Congress were writing on a clean slate, as when it enacts welfare legislation unburdened by historical, treaty-created rights and adjudicated rights—but even in welfare legislation, baseless distinctions do not pass muster. *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528; *Weinberger* v. *Weisenfeld*, 420 U.S. 636.

Given this purpose, it was the task of Congress to enact statutes inclusive of the true, present-day beneficiaries of these judgments. The Appellees do not question the power of Congress to provide appropriations for and to distribute benefits to Indian tribes in the exercise of its plenary powers where there are existing Indian tribes and where present policy considerations of the relations with such Indian tribes and their members are involved. But, where there are no such present policy questions and the appropriations and distributions are to compensate for historical wrongs to a dissolved and abandoned tribe, the Appellees contend that no political questions are involved which immunize the Congressional acts from judicial scrutiny under the Fifth Amendment principles. The Appellees further contend that the Congress may not extend the tribal label to a group of Indians in order to distribute funds to such tribe and in so doing exclude persons with a claim to such funds which stands on equal footing with the members of such newly-recognized "tribe." *Baker* v. *Carr*, *supra*.

The Secretary, on page 33, note 33, of his Brief, states that, as evidence that Congress intended to award the entire judgment to the modern successors of the Delaware Tribe, the statute provides "that the tribes must in turn

allocate the bulk of their portion to certain designated members." There is no such provision in the statute. The Absentee portion of the ten per cent was to be used "for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior" (Section 1294(a)).

In the latter portion of this footnote, the Secretary, in a quotation from Section 1294(b), dropped the words "Delaware Tribe of Indians" and replaced them in brackets with "Cherokee Delawares." There is no reference in the statute to "Cherokee Delawares."

In the statute for the distribution of the Docket 337 funds, Congress referred to the Absentees by the tribal name but the Delaware Tribe of Indians was not named. Rather, expense reimbursement was to be made to the "Cherokee Delawares."

It is submitted that there is nothing in the challenged statute which indicates that the purpose of Congress in the enactment of the challenged statute was anything other than to compensate the present representatives of the persons wronged in 1854 and no purpose to provide benefits to an existing tribe known as the Delaware Tribe of Indians as successor to such persons or otherwise, is shown.

B.

In view of the legislative purpose for which the Congress enacted the statute in question, the District Court correctly determined that the challenged statute embodies an invidious discrimination in violation of the due process clause of the Fifth Amendment.

The District Court found that the Kansas Delawares and the other two classes stood on equal footing with respect to their claims to share in Dockets 72 and 298 funds. In doing so, the District Court applied long-established and accepted Fifth Amendment tests "applied in light of the purposes of the Indian Claims Commission Act, the treaties and the relief of the award affords for injury to the ancestral tribe" (J.S. App. 49a). The District Court found that the "unequal treatment rests on no foundation rationally related to a legitimate governmental interest serving the purposes of the Act" (J.S. App. 50a).

The rationality standards applied by the District Court were those approved by this Court in many cases. *Weinberger* v. *Salfi*, 422 U.S. 749; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73; *Richardson* v. *Belcher*, 404 U.S. 78, 81-82; *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809.

Classifications in statutes must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412, 415; *Reed* v. *Reed*, 404 U.S. 71, 75-76. See also, *Johnson* v. *Robison*, 415 U.S. 361, 374-75.

It is undisputed that lineal ancestors of the present Kansas Delaware class were members of the tribe in 1854, the time of the wrong. Without consideration of any subsequent events, they would stand on equal footing in relation to a claim to share in compensation for such wrong.

It has been the position of the Indian Claims Commission and the Court of Claims that maintenance or lack of maintenance of tribal relations by parties wronged by a breach of a treaty does not affect the right of lineal descendants of the parties wronged to share in funds appropriated to compensate for such wrong. *McGhee* v. *Creek Nation*, 122 Ct.Cl. 380, 388, *cert. den.* 344 U.S. 856.

In 1974, in the case of *Turtle Mountain Band of Chippewa Indians* v *United States*, 490 F.2d 935, 954, the Court of Claims reiterated the rule:

> "As we held in *McGhee*, the ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity."

This principle of "ownership" of a claim before the Indian Claims Commission has been established for 24 years and, as to the Delawares, no events which occurred after 1854 would affect the rights of the Kansas Delaware class to share in the award.

Assuming, *arguendo*, that "subsequent events" can afford a rationale to exclude members of the Kansas Delaware class, the inquiry is whether there were any such events sufficient to form the rationale to support what is otherwise an invidious discrimination.

The Appellants cite the events which they contend justify such discrimination as follows:

(a) The Appellants contend that the adult Kansas Delawares resigned from the tribe under the Treaty of 1866 and gave up any rights to share in the property or annuities of the Delaware Tribe.

The claim which was reduced to judgment in Dockets 72 and 298 is not an asset or benefit which was received by the tribe after 1866 but was a claim then owned by the tribe. The condition of the resignation of the adult Kansas Delawares was that such persons would receive their pro-rata share of the trust fund now represented in part by the appropriated funds in issue.

The Appellants' contention as to the effect of this resignation presents the anomaly that the United States and the Delaware Tribe, who agreed by the Treaty of 1866 that resigning members of such tribe, *as a condition to their resignation*, were entitled to receive their pro-rata part of what is now an appropriated fund (Article IX, Treaty of 1866, J.S. App. 113a), now seek to offer as a rationale for excluding the descendants of such resigning members from pro-rata share of such funds, that *their ancestors resigned from the tribe.*

The irrationality of this contention is evident.

(b) The Appellants contend that the minor children of the adult Kansas Delawares were granted citizenship by the United States in 1874 (Act of June 22, 1874, 18 Stat. 146, 175) and, asserting that there was an incompatibility between United States citizenship and tribal citizenship, contend that this Act terminated the membership of such minors in the tribe.

Many cases, cited under Proposition II-C of this brief have held that United States citizenship is not incompatible with tribal membership. Therefore, the asserted "event" of termination of tribal membership did not occur.

(c) The Appellants contend that in 1904 an appropriation was made to the Delaware Tribe residing in the Cherokee Nation, in settlement of claims asserted only by the band of Delawares within the Cherokee Nation, and the Kansas Delawares were not included on the payroll for the payment of such appropriation.

This payroll was a special roll for a specific appropriation which, by the terms of the appropriation act, did not include the Kansas Delawares. This affords no rationale to exclude the Kansas Delawares from a roll to be prepared to compensate for a wrong which was suffered by their lineal ancestors when those ancestors were with the tribe.

(d) The Appellants contend that the Kansas Delawares did not participate in the Indian Claims Commission actions. The entities and parties who did bring and prosecute the Indian Claims Commission actions did so on behalf of the historical tribe, as representatives of such tribe. See *McGhee* v. *Creek Nation, supra*. No participation by the Kansas Delawares as a named group was necessary for them to be able to assert their claim.

Further, the Kansas Delawares were participating members of the Delaware Tribe of Indians, one of the claimant groups, and a Kansas Delaware was chairman of the Delaware Tribal Business Committee at the time the Indian Claims Commission suits were commenced. The Delaware Tribe of Indians, by resolution after the Indian

Claims Commission actions were filed, acknowledged the right of Kansas Delawares to share in tribal assets. Exhibit 94, Vol. XXVII of Record.

This asserted supporting rationale for the discrimination is without substance.

(e) The Appellants contend that there were difficulties in the administration of 25 U.S.C. §§ 1181-86 (Pub. Law 90-508, 82 Stat. 861) which Congress sought to avoid in the distribution of the subsequent award under the Act here in issue.

The asserted administrative difficulties did not involve the Kansas Delawares (see J.S. App. 30a-39a) and an exclusion of the Kansas Delawares was unnecessary to prevent such difficulties since the names of the lineal ancestors of the Kansas Delawares appear on an official roll filed with the Commissioner of Indian Affairs pursuant to Article IX of the Treaty of 1866. There is thus no need to refer to vague and uncertain ethnological evidence to substantiate the payment applications of the Kansas Delawares. (See discussion of this asserted rationale in the opinion of the District Court (J.S. App. 35a, 39a).)

The Secretary suggests that there are reasons in addition to events subsequent to 1854 which justify the discrimination. The reasons are:

1. To require that the Secretary undertake individualized adjudications of descendancy from tribal members in the distant past will impose a "massive and unyielding administrative burden on the Secretary."

This suggestion is a bugaboo.[4] As stated, the Kansas Delawares are lineal descendants of persons on a recorded roll of 69 ancestors. The roll for the payment of Docket 337 funds (25 U.S.C. § 1181) needs only to be opened and updated. There is no administrative burden in so doing which is any different than the use of rolls which form the basis for eligibility in all the other distributions of Indian Claims Commission awards which have been made on a descendancy basis. It is, in fact, less burdensome since there is recorded roll of Kansas Delawares and no "catch-all" clause is necessary to effect their inclusion.

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[4] "Catch-all" provisions are in many distribution acts. See 25 U.S.C. §967(a) which included all Indians "who possess original Omaha blood of the degree of one-fourth or more."

See 25 U.S.C. §601 (Yakima Tribes) which provides eligibility for "all living persons who are of the blood of the fourteen original Yakima Tribes, parties to the treaty of June 9, 1855" and whose ancestors received certain allotments.

See 25 U.S.C. §1011 (Snake or Paiute Indians of Oregon) which provides for eligibility to all descendants of any members of the bands of Indians whose chiefs signed the treaty of December 10, 1868.

See 25 U.S.C. §1101 (Nooksack Tribe) which provided eligibility to "descendants of members of the Nooksack Tribe as it existed in 1855."

See 25 U.S.C. §1131 (Duwamish Tribe) which provided eligibility to "descendants of members of the Duwamish Tribe as it existed in 1855."

See 25 U.S.C. §1151 (Chehalis Tribe) which provided eligibility to "descendants of members of the Upper and Lower Chehalis Tribes as they existed in 1855."

See 25 U.S.C. §1232 (Chemehuevi Tribe) which provides for eligibility to "descendants of members of the Chemehuevi Tribe as it existed in 1860" and "on any other available census roll or other record or evidence acceptable to the Secretary."

In each distribution statute where Indian Claims Commission funds are to be distributed through the tribal entities to members of the tribe, it is necessary to prepare updated rolls under the supervision of the Secretary.

Assuming, *arguendo*, that there would be an administrative burden involved in the preparation of the roll for distribution if such roll included the lineal descendants of the Article IX Kansas Delawares, to eliminate such parties on this basis is an "arbitrary legislative choice" which denies equal protection of the laws. *Reed* v. *Reed*, 404 U.S. 71, 76. Congress may not casually deprive a class of individuals of their rights because of some remote administrative benefit to the government. *Carrington* v. *Rash*, 380 U.S. 89, 96. The Constitution recognizes higher values than speed and efficiency. *Stanley* v. *Illinois*, 405 U.S. 645, 656.

2. The Appellants contend that if the subject funds had been designated for distribution to the tribes (rather than to individuals) and the tribes had distributed the funds to their members, the result would have been the same as under the challenged statute and would have been immune from constitutional attack.

This rationale is faulty for several reasons. First, the Congress did not determine that the two modern day groups are representative of the historical tribe. Second, at the time of the enactment of the subject statute, the Kansas Delawares were recognized as members and were participating in the affairs of the "Delaware Tribe of Indians" and would have received their pro-rata share of such funds. The "roll" of such tribe was the payment roll for the Docket 337 funds. Third, the distribution statute does not require that the individuals to be included on the payment roll have any affiliation with modern-day tribal entities. Fourth, the distribution statute as adopted by Congress provided for distribution to many persons who

were not eligible to be, and were not, members of the Absentee tribe (J.S. App. 38a, note 35).

3. The Secretary asserts that the Cherokee Delawares and Absentee Delawares "are wards of the nation" and that the ancestors of the present Kansas Delawares ceased being wards of the nation more than a century ago when they left the tribe (Brief for the Secretary of the Interior, pp. 26, 27).

None of the claiming parties are wards of the nation. They are all emancipated, fully assimilated Indians and the distinction urged is contrary to the facts. The United States in the Indian Claims Commission action leading to the judgment in Dockets 72 and 298 sought a dismissal of the actions on the grounds that the Delawares were non-wards and were unsuccessful only because the Indian Claims Commission found that they constituted "identifiable groups" with standing to represent the historical tribe. (See brief by the United States in Indian Claims Commission Docket 27A, filed June 16, 1952, pp. 26, 31.) There is no proof in the record to sustain the claim of "wardship."

The Appellees submit that none of the suggested reasons for excluding the Kansas Delawares from the distribution of the award meet the test of rationality, given the legislative purpose to be served by the statute, *viz.*, to compensate the present representatives of the Delaware Tribe as it existed in 1854.

C.

Assuming, arguendo, that the issue of "expatriation," as presented by the Appellants, is a material issue in these appeals, the statutory grant of citizenship to the Kansas Delawares who were minors in 1867 did not result in an "expatriation" of such minors.

The Absentees argue that when Congress, by the Act of June 22, 1874 (18 Stat. 146, 175), conferred United States citizenship on minor Kansas Delaware Indians, the effect was to terminate their membership in the Delaware Tribe of Indians, citing *Elk* v. *Wilkins,* 112 U.S. 94. This argument is based upon the assertion that this Court held in the *Elk* case that United States citizenship and Indian tribal membership are incompatible. The *Elk* case did not so hold. The holding in *Elk* was that an Indian could not at will claim United States citizenship by virtue of the fact that he had resigned from an Indian tribe. This Court stated that United States citizenship could only be conferred by the United States. The Court did not discuss any question of incompatibility between tribal membership and United States citizenship.

This Court in many cases has held that such dual memberships are not incompatible. *United States* v. *Nice,* 241 U.S. 591, 598; *United States* v. *Noble,* 237 U.S. 74, 79; *Hallowell* v. *United States,* 221 U.S. 317, 324; *Williams* v. *Johnson,* 239 U.S. 414, 420; *United States* v. *Sandoval,* 231 U.S. 28, 48.

The right of an Indian to membership in his tribe is a valuable right which cannot be terminated except by a clear and unequivocal Act of Congress. This Court has

held that a mere grant of United States citizenship does not terminate Indian tribal membership. *Winston* v. *Amos*, 255 U.S. 373.

III.

WHEN THE ADULT KANSAS DELAWARES RESIGNED FROM THE TRIBE IN 1866 ON THE EXPRESS CONDITION THAT THEY WOULD BE ENTITLED TO RECEIVE THEIR PRO-RATA SHARE OF THE TRIBAL TRUST FUND, THEIR INTEREST IN SUCH FUND, INCLUDING ANY ADDITIONS THERETO FOR WRONGS PRIOR TO 1866, BECAME INDIVIDUALIZED AND IS A PROPERTY RIGHT WHICH IS PROTECTED AGAINST UNCOMPENSATED TAKING BY THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The District Court found that the Kansas Delawares had no vested rights which if taken without compensation would be protected by the just compensation component of the Fifth Amendment (J.S. App. 61a, 62a). Since the subject statute was found to be invidiously discriminatory and unconstitutional when measured by familiar standards of due process and equal protection, the finding that the just compensation component of the Fifth Amendment had no application to the case was not appealed from. However, if for any reason this Court should find that the subject distribution statute was not invidiously discriminatory against the Kansas Delawares, the decision of the District Court should nevertheless be affirmed on the ground that the subject distribution statute was unconstitutional for the reason that it provided for the taking of property of the Kansas Delaware class without just compensation. In *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937), the Court stated:

> "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

See also, *United States* v. *Powell*, 423 U.S. 73 (1975), and *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 (1970).

This claim is asserted by the Kansas Delawares as direct blood descendants and thus as representatives of the adult Delaware tribal members who resigned from the tribe pursuant to Article IX of the Delaware Treaty of 1866 (14 Stat. 793) on the express condition that they would receive their just proportion of the Delaware tribal trust fund. An individualization of a trust fund by a treaty which has been carried into effect has been recognized as creating a right which is protected by the Fifth Amendment against taking without just compensation. *Jones* v. *Meehan*, 175 U.S. 1; *Choate* v. *Trapp*, 224 U.S. 655. See also, *Sizemore* v. *Brady*, 235 U.S. 411.

Such a taking without just compensation offends the Fifth Amendment even though the "taking" is in the form of a benefit belonging to one Indian group being conferred on another Indian group, *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476; *United States* v. *Creek Nation*, 295 U.S. 103; or, selling lands belonging to a tribe as public land, *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110; or, taking individualized Indian land, *Big Eagle* v. *United States*, 323 F.Supp. 60; or, misappropriating individualized Indian funds. *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202, *cert. den.* 366 U.S. 924.

The just compensation claim of the Appellees was denied on the basis that Congress, in adopting the Indian Claims Commission Act, had reserved to itself the procedures for the subsequent distribution and determination of whether portions of the fund should be held in trust for the Indians' benefit. The District Court said:

> "In light of these undecided points remaining for congressional decision after entry of the Commission's award, it seems clear that no individual or class property right attaches or vests in the Commission's award as entered, such rights depending on later congressional determination" (J.S. App. 63a).

It is submitted that entitlement to relief under the just compensation clause is not dependent upon a finding that a property right had "vested" under the common-law precepts. The question is whether such rights became individualized by an implemented treaty so that a taking of those rights would offend the just compensation clause.

When the 21 adults (an "identifiable group" of Indians as the term is used in the Indian Claims Commission Act (25 U.S.C. § 70a)) elected to resign on the condition that they would receive their just proportion of the very funds here in dispute, a register was made identifying those persons and was filed with the Commissioner of Indian Affairs as provided in Article IX of the Treaty. Their just proportion was then determined and, we submit, that their proportionate share of the subject funds is a valuable property right. The Act in question did not provide for compensation to such persons or their lineal descendants or heirs. The Act did not take their right into account to any degree.

It is submitted that the claim presented to the Indian Claims Commission in Dockets 72 and 298 belonged to the Delaware Tribe as it existed in 1854; that a proportionate part of such claim passed to the adult Kansas Delawares in 1866 by virtue of Article IX of the Treaty of 1866; that when the funds were appropriated to pay the proceeds of this claim to individuals and not to modern tribal entities the present representatives of such adult Kansas Delawares had such an interest therein that the exclusion of them from the distribution and the distribution of all of the funds to other individuals was a taking of property without just compensation. See *Jones* v. *Meehan, supra*; *Choate* v. *Trapp*, 224 U.S. 665, 672-77; *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202, 212 (Ct. Cl. 1960) Relief by way of an injunction prior to a proposed unconstitutional distribution is proper. *Lane* v. *Pueblo of Santa Rosa, supra*. The decision of the District Court that the statute was unconstitutional should be affirmed on this basis, in addition to the basis upon which the District Court held the statute to be invalid.

ISSUES NOT PRESENTED BY THESE APPEALS

The Appellants have throughout their briefs made incorrect statements as to what the District Court did. While the Opinion and Judgment of the District Court speak for themselves, the Appellees point out the references by the Appellants which can be misleading and which misstate the issues in this case.

Brief of Delaware Tribal Business Committee, et al., Case No. 75-1301

1. The District Court did not "instruct Congress as to how it shall deal with Indian tribes" (page 14).

2. The District Court did not say that "it is irrational to draw a distinction between Indian tribes and their members and ordinary American citizens of some decree of Indian descent" (page 14).

3. The District Court did not evade the prohibition of suits against Indian sovereign bodies by the misuse of a class action to place a tribal asset in jeopardy" (page 16).

4. The District Court did not feel "that application of the treaties according to their plain terms would work an inequity and therefore, in effect, revised them" (page 17).

5. The District Court did not hold "the treaties by which the Delaware claim and award arose as only marginally relevant to the resulting distribution" (page 23).

6. The District Court did not conclude "that the Government did not have a legitimate interest in legislating specially on behalf of Indian tribes and their citizens" (page 25).

Brief of Absentee Delaware Tribal Business Committee, Case No. 75-1335

1. The essence of the District Court's opinion was not "its view that Lone Wolf had been impliedly overruled by the reasoning of Baker v. Carr" (pages 26, 31).

2. The District Court did not conclude that "the Constitution requires Indian claims judgments to be paid to

all those individuals who are lineal descendants of the ancient tribe, as it was composed at the 'time of the wrong'" (page 38).

3. The District Court did not say "that all that is necessary to evade the rule that Indian tribes are immune from suit is to certify the persons whom Congress had denominated members of the tribe as members of a class" (page 42).

4. The District Court did not instruct that Congress should legislate again (page 46).

5. The District Court did not vitiate "the distribution statute to the two federally recognized Delaware Tribes" (page 47).

6. The District Court did not inquire "with the greatest detail into the motives which it believed moved Congress to enact the statute now at bar" (page 49).

7. The District Court did not "disregard" the provisions of Article IX of the Treaty of 1866 (page 60).

Brief of the Secretary of the Interior, Case No. 75-1495

1. The District Court did not reject "the decision of Congress to distribute the judgment of the Indian Claims Commission to tribal members" (page 12).

2. The District Court did not interpret "the Due Process Clause to require, in essence, a *per capita* distribution of the judgment to all lineal descendants of members of the Delaware Tribe at the time of the alleged wrong" (page 12).

3. The District Court did not deprive "Congress of its discretion to determine the most beneficial method of allocating tribal property" (page 12).

4. The District Court did not "ignore two centuries of precedent" and did not "invade an area reserved under the Constitution to Congress" (page 20).

5. The District Court did not require the Secretary "to undertake individualized adjudications of descendancy from tribal members in the distant past" (page 23).

6. The District Court did not consider the legislative history of the challenged statute "as proof of its unconstitutionality" (page 36).

The Appellees do not in this brief specifically respond to the arguments in the Appellants' briefs which are directly based on the above misconceptions of what the District Court did. To do so would be to present and argue matters not before the Court in these appeals. A reading of the Opinion of the District Court will reveal a most painstaking analysis of the applicable principles. The same reading will thoroughly debunk the foregoing palpable misstatements of the words, reasoning and action of the District Court.

CONCLUSION

The Secretary states (Brief for the Secretary, Case No. 75-1495, page 42) that since the payment of the funds under the challenged statute has not yet occurred, "Congress has the power to alter its initial judgment." The decision of the District Court makes it possible for Congress

to do so with the history and status of the Kansas Delawares, as a claiming group, before it. If Congress desires to provide for a distribution of the challenged funds to tribal entities, it will do so. If Congress desires to statutorily define membership in existing tribal entities, it will do so. If Congress enacts a distribution statute so as to provide for distributions to lineal descendants on a per capita basis, it is only prohibited from invidiously discriminating between persons who stand on equal footing as to a claim to participate in such funds. This does not depart from long-established requirements of due process nor invade any plenary powers of Congress. The Appellees are not outside the protection of the Fifth Amendment just because they have some fractional Indian blood in their veins.

The Absentees suggest that, even though Congress may have erred and provided for the taking of property without just compensation, the courts are impotent to prevent a wrongful payment. They suggest that the Secretary should be permitted to pay these funds according to the terms of the challenged statute, even if wrong, and that the Kansas Delawares should pursue a right to payment in a Court of Claims action under the Tucker Act. The result of this procedure would be a double payment by the taxpayers to the extent of over a million dollars and a windfall to the two groups who misled Congress into the enactment of the challenged statute in its present form. In the case of the Absentees, this would also result in a payment of over two million dollars to a group whose ancestors were not with the tribe at the time of the wrong in 1854 and whose ancestors owned no share of the tribal

fund which was diminished by the wrong. In the case of the Cherokee Delawares, this group also claims a right to share in all benefits of the Indian Claims Commission awards to the Cherokee Nation and they thus seek to be Delawares where there are Delaware funds and Cherokees where there are Cherokee funds. (See Admissions No. 119, Request for Admissions, Volume IV of Record, p. 751.)

These are all matters which Congress will consider when it re-enacts a distribution statute. The challenged statute results in such a palpable and unjust scheme for the distribution of the Dockets 72 and 298 funds that the only solution is to affirm the judgment of the District Court so as to give Congress an opportunity to enact valid legislation for the benefit of all of the parties entitled to share.

Respectfully submitted,

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September, 1976

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this ..... day of September, 1976, service three copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High, Patton & Rothbaum, 323 Fidelity Plaza, Oklahoma City, Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant United States Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of the Interior of the United States; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver Streets, Tulsa, Oklahoma 74119, counsel of record for the Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail first class postage fully prepaid; I further certify that I did, on this ..... day of September, 1976, serve three copies of the foregoing on Mr. Joseph S. Fontana, Winston and Strawn, Suite 1040, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for the Cherokee Delaware class and named individual members thereof; Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this ..... day of September, 1976, in

conformity with 80 Stat. 613, 28 U.S.C. § 518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; and I further certify that all parties required to be served have been served.

_____

Delmer L. Stagner

Supreme Court, U. S.
FILED
OCT 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,

v.

WANDA JUNE WEEKS,
Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma

REPLY BRIEF FOR THE DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL.

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TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	14
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES:

Absentee Delaware Tribe of Oklahoma v. *United States*, 5 Ind. Cl. Comm'n 491-92 (1957) 8

Board of County Supervisors v. *Seber*, 318 U.S. 705 (1943) 10

Cherokee Freedmen v. *United States*, 195 Ct. Cl. 39 (1971) 10

Cherokee Nation v. *Journeycake*, 155 U.S. 196 (1894) . 8

Commercial Trust Co. of New Jersey v. *Miller*, 262 U.S. 51 (1923) 3

Delaware Indians v. *Cherokee Nation*, 193 U.S. 127 (1904) 8

Delaware Tribe of Indians v. *United States*, 128 F. Supp. 391 (Ct. Cl. 1955) 8

Delaware Tribe of Indians v. *United States*, 2 Ind. Cl. Comm'n 253 (1952) 8

Gilligan v. *Morgan*, 413 U.S. 1 (1973) 5

Holden v. *Joy*, 84 U.S. (17 Wall.) 211 (1872) 3

Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 3, 4, 13

Morton v. *Mancari*, 417 U.S. 535 (1974) 2, 3, 7, 10

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335 (1940) 3

Red Lake and Pembina Bands v. *Turtle Mountain Band of Chippewa Indians*, 355 F.2d 936 (Ct. Cl. 1965) 10

Sac and Fox Indians of the Mississippi in Iowa v. *Sac and Fox Indians of the Mississippi in Oklahoma*, 220 U.S. 481 (1911) 10

	Page
Sizemore v. *Brady*, 235 U.S. 441 (1914)	11
United States v. *First National Bank*, 234 U.S. 245 (1914)	4
United States v. *Forty-three Gallons of Whiskey*, 93 U.S. (3 Otto) 188 (1876)	3
United States v. *Holliday*, 70 U.S. (3 Wall.) 407 (1865)	4, 13
United States v. *Jim*, 409 U.S. 80 (1972)	11
United States v. *Sandoval*, 231 U.S. 28 (1913)	3, 10
United States ex rel. Standing Bear v. *Crook*, 25 Fed. Cas. No. 14,891 (C.C. Neb. 1879)	12
United States v. *State Tax Commission of Mississippi*, 535 F.2d 300 (5th Cir. 1976), *aff'g on rehearing*, 505 F.2d 633 (5th Cir. 1974)	6
United States v. *State Tax Commission of Mississippi*, 505 F.2d 633 (5th Cir. 1974), *aff'd on rehearing*, 535 F.2d 300 (5th Cir. 1976)	6

STATUTES AND TREATIES:

25 U.S.C. § 71 (1970)	3
25 U.S.C. § 1182 (1970)	8
25 U.S.C. § 1291 (Supp. IV, 1974)	8
25 U.S.C. § 1292(c) (Supp. IV, 1974)	8
25 U.S.C. § 1294(b) (Supp. IV, 1974)	8, 9
Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222	8
Act of Feb. 7, 1925, ch. 148, 43 Stat. 812	8
Treaty of July 8, 1817, 7 Stat. 156 (Cherokee)	12
Treaty of Feb. 27, 1819, 7 Stat. 195 (Cherokee)	12
Treaty of Sep. 5, 1820, 7 Stat. 210 (Choctaw)	12
Treaty of Sep. 27, 1830, 7 Stat. 333 (Choctaw)	12
Treaty of Oct. 20, 1832, 7 Stat. 381 (Chickasaw)	12
Treaty of Dec. 29, 1835, 7 Stat. 478 (Cherokee)	12
Treaty of May 6, 1854, 10 Stat. 1048 (Delaware)	7
Treaty of Feb. 5, 1856, 11 Stat. 663 (Stockbridge and Munsee)	12

	Page
Treaty of June 19, 1858, 12 Stat. 1037 (Sioux)	12
Treaty of Nov. 15, 1861, 12 Stat. 1191 (Potawatomi)	12
Treaty of June 28, 1862, 13 Stat. 623 (Kickapoo)	12
Treaty of July 4, 1866, 14 Stat. 793 (Delaware)	7
Treaty of Feb. 23, 1867, 15 Stat. 513 (Ottawa, others)	12
Treaty of Feb. 27, 1867, 15 Stat. 531 (Potawatomi)	12

MISCELLANEOUS:

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (U.N.Mex. ed. 1942)	3, 4
C. WESLAGER, THE DELAWARE INDIANS (Rutgers U. 1972)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,

v.

WANDA JUNE WEEKS,
Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma

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REPLY BRIEF FOR THE DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL.

ARGUMENT

The Court will receive scant assistance from the Brief for Appellee Weeks, for, in an amazing passage, the brief writer disavows any intention of responding to Appellant's principal arguments. Brief for Appellees, at 60-62. He asserts that the trial court did not hold what Appellants say it did. But that is mere brief writer's *fiat*.

For example, it is stated that the "District Court did not instruct Congress as to how it shall deal with Indian tribes"; therefore the brief writer elects not to face squarely the separation of powers issue.

However, it is plain that the decision lectures Congress (we paraphrase):

> If, in passing a statute for distribution of an Indian Claims Commission award for rectification of an ancient wrong to tribal property, you decide to make any *per capita* distribution, you must include therein all lineal descendants of the tribal members as of the date of the wrong, whether or not they are now members, or your statute will be unconstitutional.[1]

If that is not instruction to the political branches of Government, words have lost meaning.

The brief fails to meet the constitutional questions as to justiciability and rational classification on the facts as unanimously found below. It does not mention, much less attempt to explain or distinguish, *Morton v. Mancari,* 417 U.S. 535 (1974). It further proceeds upon the fallacious assumption that the Indian Claims Commission award was intended to redress representatives of "persons" who were wronged in 1854, whereas it is clear that the 1854 wrong was to tribal property held communally rather than individually. Brief for Appellees, at 43-44.

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[1] We are aware of the internal inconsistency in the decision below that apparently finds no fault, *per se,* in the distribution of 10 percent of the award to the tribes for tribal purposes, but that nevertheless sweeps the 10 percent away on the theory that the provisions of the statute are not severable. Tacitly, at least, the majority seems to approve this provision. Yet it obviously violates the majority's mistaken concept of equal treatment, for, under the majority doctrine a tribal member would receive, directly, his *per capita* share, *plus, indirectly,* the communal benefits to the tribe from the reserved 10 percent, while the alien to the tribe would not receive the latter. This inconsistency is but another of the idicia of the error in the majority's approach to the case.

While as partisan litigants the Delawares can take advantage of Appellee's failure to face the issue of justiciability, it is regrettable that this important issue is not realistically debated.

The doctrine of nonjusticiability was born of necessity under our system of separation of powers. When this Government was founded, Americans of European descent were in armed conflict with Americans of Indian descent along virtually the entire western frontier. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 39 (U.N.Mex. ed. 1942). Closing those wars with Indian nations was no more a function of the judiciary than the settlement of any other war. *See Commercial Trust Co. of New Jersey v. Miller,* 262 U.S. 51, 57 (1923); *United States v. Forty-three Gallons of Whiskey,* 93 U.S. (3 Otto) 188, 197 (1876); *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 242-43 (1872). The various recognitions and treaties were obviously political, not judicial, actions. *United States v. Sandoval,* 231 U.S. 28, 47 (1913); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 565 (1903).

These conditions prevailed, for more or less a century after the adoption of the Constitution, until 1871, when congressional enactments took the place of treaties. 25 U.S.C. § 71 (1970). Although outright armed hostilities were soon to cease, the essential nature of the problem of dealing with the various tribes or groups and exercising guardianship over them has not changed. *See Morton v. Mancari,* 417 U.S. 535, 551-53 (1974). As Justice Jackson observed in *Northwestern Bands of Shoshone Indians v. United States,* 324 U.S. 335, 355 (1940) (concurring opinion), the problem remains "essentially a sociological problem, not a legal one."

The Executive and Legislative branches of the Government have dealt with the problem in varying and inconsistent ways in their endeavor to find a solution acceptable to all Americans regardless of ethnic descent. We have gone through the periods of warfare, treaties, removal and allotment, reservations, removal of stewardship and reservation status, cooperative ventures, and the end is not yet in sight. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 46-88 (U.N.Mex. ed. 1942). These various and shifting policies were adopted by public servants just as conscientious and thoughtful as the judiciary and undoubtedly better equipped in the problems than most federal judges. *See United States v. Holliday,* 70 U.S. (3 Wall.) 407, 419 (1865). Yet the Government has been unable to follow a consistent course.

If the matter had been subjected to judicial supervision, with the supposed certainty and consistency that should follow therefrom, the various shifts, turns, and experimentations that have produced a bettered but still trouble-ridden situation would have been impossible, or at least cumbered by delay and bitterness. Thus the doctrine of nonjusticiability as applied to Indian treaties and treaty rectification represents sound governmental and constitutional doctrine. The judiciary is not equipped to handle the situation and should recognize the desirability of not interfering with the political branches of the Government even though in any particular case it believes those branches may have acted unwisely. *United States v. First National Bank,* 234 U.S. 245, 260 (1914); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 568 (1903).

The majority below treated this case as simply one of making an "equitable distribution" following an award

of what sum was due. J.S. App. 25a. However, deeper considerations are involved—obviously Congress should consider, and did here, what, in this particular situation, would have a future therapeutic effect for the tribes and their members. See Brief for The Delaware Tribal Business Committee, *et al.,* at 37-38. Thus the doctrine of nonjusticiability is not mere legal dogma—it is founded on governmental realities. *See Gilligan v. Morgan,* 413 U.S. 1, 10-11 (1973).

What Appellee endeavors in her brief is substantially to advance the theories submitted in her Jurisdictional Statement in Case No. 75-1328, in which jurisdiction has not been noted.

While we shall not argue an appeal not before the Court, nevertheless, it may be noted that the gist of Appellee's position there, now transferred to these appeals, was that the Delaware Tribe "dissolved," in some unstated way, when its members, after giving consideration, went to live among the Cherokees in the ethnically confused situation then prevailing in the Indian Territory.

The theory espoused by Appellee is not the theory of the District Court, which expressly held that the Delawares constantly "maintained group identity." J.S. App. 11a and 11a n. 12. Appellee would erect her legal theory upon assumed (and unfound and incorrect) facts to the general effect that the Delaware Tribe was non-existent from 1867 until about 1974. That is scarcely permissible on appeal. Therefore, it seems clear that the truly opposing views with which the Court will be concerned in deciding these appeals are those of the majority below on the one hand and of the dissent and Appellants' briefs on the other.

Appellee concedes that the Delaware Tribe is a federally recognized tribe, although she erroneously claims the recognition came after this litigation had been started. Brief for Appellee, at 36. Recognition by the Commissioner of the Bureau of Indian Affairs was made May 31, 1962. Joint App., at 106. She would avoid this recognition on the ground that it was extended "arbitrarily," citing *United States v. State Tax Commission of Mississippi,* 505 F.2d 633 (5th Cir. 1974), *aff'd on rehearing,* 535 F.2d 300 (5th Cir. 1976). There the Fifth Circuit, as an alternative ground for a decision, would not recognize a federal administrative declaration of tribeship made to a disorganized group of citizens of some Indian descent (much like Appellee and the other so-called Kansas "Delawares") where the statute under which the administrative authorities purported to act authorized them to extend tribal recognition only to groups living on reservations. *Id.* at 642-43. No such abuse of congressionally delegated authority exists here. Here the continuous stream of tribal recognitions, including that in the statute under attack, repeatedly was congressional.

Further, as the court clarified on rehearing, the *Mississippi Tax Commission* decision was a narrow one, indeed. The court only considered whether "the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood" was impaired. 535 F.2d at 306. The court stated:

> As to the dealings between the Secretary of the Interior and the United States government, on the one hand, and the Mississippi Choctaws, on the other, we do not purport to pass on their validity *vis a vis* the participants.

Id.

The fact is this case remains simply one of citizens solely of the United States with some degree of Delaware descent challenging a congressional policy designed to benefit federally recognized Delaware tribes and their members and to exclude all others. Such challenge is foreclosed by this Court's decision in *Morton v. Mancari,* 417 U.S. 535 (1974).

Moreover, the 1854 Treaty, which was being enforced or vindicated by the Indian Claims Commission award, itself provides that the proceeds arising from the land sale should be applied, as Congress in its discretion may provide, "for the benefit of *the Delaware people.*" Treaty of May 6, 1854, arts. 7, 8, 10 Stat. 1048, 1050, J.S. App. 102a (emphasis added). Appellee and her ancestors have not been "Delaware people" since 1866, when her ancestors elected to become United States citizens and:

> . . . cease to be members of the Delaware tribe, and . . . not further participate in their councils, nor share in their properties or annuities.

Treaty of July 4, 1866, art. IX, 14 Stat. 793, 796, J.S. App. 113a-14a. Thus, by distributing the judgment fund to the two successor Delaware tribes and tribal members, that together comprise fully "the Delaware people," Congress simply and totally fulfilled its treaty obligations to the Delaware Nation, as it exists today. This distribution can be voided only by eschewing the 1854 and 1866 treaties, which the District Court did, but which is forbidden under the American scheme of constitutional government.

The history and traditions of the Tribe and the consistent, repeated recognition of the Tribe by a full range of the federal institutions responsible for Indian affairs entirely refute Appellee's contentions. The find-

ing of the Indian Claims Commission,[2] that of the Court of Claims,[3] the recitals of Congress in the distribution statutes,[4] the unanimous finding of the District Court that the "Cherokee Delawares" had steadily maintained group identity,[5] and 35 U.S. statutes, enacted from 1868, recognizing the Delaware Tribe for numerous purposes[6] render Appellee's assertion utterly groundless.[7]

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[2] *Delaware Tribe of Indians v. United States,* 2 Ind. Cl. Comm'n 253, 260, 265 (1952); *see Absentee Delaware Tribe of Oklahoma v. United States,* 5 Ind. Cl. Comm'n 491-92 (1957).

[3] *Delaware Tribe of Indians v. United States,* 128 F. Supp. 391, 398 (Ct. Cl. 1955).

[4] 25 U.S.C. §§ 1291, 1292(c), 1294(b) (Supp. IV, 1974); 25 U.S.C. § 1182 (1970).

[5] J.S. App. 11a and 11a n.12.

[6] In these statutes, the Delaware Tribe of Indians has been recognized for the appropriation of funds, for grants of jurisdiction to pursue tribal claims in the Court of Claims, and for numerous other purposes. Perhaps the most relevant of these statutes are a 1904 act appropriating funds for the payment of $150,000 in settlement of pending tribal claims, including a claim based on the 1854 Treaty, to "*the Delaware tribe of Indians* residing in the Cherokee Nation, as *said tribe* shall in council direct . . . ," Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222 (emphasis added), and a 1925 act establishing Court of Claims jurisdiction over claims of "*the Delaware tribe of Indians* residing in Oklahoma." Act of Feb. 7, 1925, ch. 148, 43 Stat. 812 (emphasis added).

Other statutes are listed in Appendix A hereto.

[7] The only support cited by Appellee for her claim that the Delaware Tribe of Indians is not an Indian tribe are the decisions of this Court in *Delaware Indians v. Cherokee Nation,* 193 U.S. 127 (1904), and *Cherokee Nation v. Journeycake,* 155 U.S. 196 (1894). Brief for Appellees, at 35. These decisions did not hold that the Delaware Tribe of Indians had dissolved. That issue was neither raised by the parties nor considered by the Court. These cases merely involved adjudication of the land rights of the Delawares *vis-a-vis* the Cherokees and concerned in no way the determination of either Delaware treaty rights against the United States or tribal existence.

The Delaware Tribe of Indians continues as an entity under the supervision and control of the Bureau of Indian Affairs. The Tribe, meeting in General Council, established Tribal Bylaws on September 7, 1958, *see* Joint App., at 101, which were approved by the Commissioner of the Bureau of Indian Affairs on May 31, 1962, Joint App., at 106. This General Council was supervised by Bureau of Indian Affairs personnel. Joint App., at 106. The By-laws were amended by the Delaware Tribal General Council in 1974, and subsequently were approved by the Bureau of Indian Affairs. Defendants' Exh. No. 26, Record Vol. XXIX. This acceptance of a tribal governing document constitutes federal recognition of the Delaware Tribe as an entity exercising powers of self-government. Moreover, following institution of the present litigation, the Secretary of the Interior certified that the Tribe organized a legal entity that adequately protects the interests of its members in receiving the funds, as required by 25 U. S. C. § 1294(b) (Supp. IV, 1974). J.S. App. 18a-19a n. 20.[8]

Only Congress can determine, by affirmative action, when the continuing and special relationship between

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[8] Appellee seeks to convert the requirement that the Delaware Tribe organize a legal entity that, in the judgment of the Secretary of the Interior, would adequately protect the interests of the members into "an awareness by Congress that there was no legal entity known as the Delaware Tribe of Indians." Brief for Appellees, at 25. This is a classic *non-sequitur.* The requirement that there be a new "entity" with adequate safeguards for handling the very substantial sum that the Tribe would receive in no way shows that Congress was "aware" that there was no entity whatsoever. Congress well knew there was a Delaware Tribe of Indians, but apparently felt it did not have adequate financial safeguards. Appellee wholly misconstrues the purposes and limited legal effect of the *proviso* to the distribution statute.

the United States and the Delaware Nation shall cease. *Board of County Commissioners v. Seber,* 318 U.S. 705, 718 (1943); *United States v. Sandoval,* 231 U.S. 28, 46, 47 (1913). It never has done so. Thus the congressional judgments inherent in the distribution statute should not be disturbed. *Morton v. Mancari,* 417 U.S. 535, 555 (1974).

Congress has ample power to distribute the judgment funds to the recognized Absentee Delaware and Delaware Tribes, and their members, without extending participation to descendants of Indians whose tribal relations were severed more than a century ago. Such method of distributing Indian Claims Commission judgments has been sanctioned by the Court of Claims. *Cherokee Freedmen v. United States,* 195 Ct. Cl. 39, 51 (1971); *Red lake and Pembina Bands v. Turtle Mtn. Band of Chippewa Indians,* 355 F.2d 936, 944 (Ct. Cl. 1965).

Nevertheless, Appellee offers two arguments in opposition.

First, Appellee contends that the ancestors of the so-called Kansas "Delawares," who were members of the Delaware Tribe in 1854, had individual, vested property rights that cannot be divested constitutionally. This was unanimously rejected below. The law is clear—the U.S. Government has never dealt with individual Indians, only with tribes; individual Indians enjoy no rights under treaties. *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma,* 220 U.S. 481 (1911). The Delaware land sold in 1854, and the proceeds received in return, was tribal property, held communally, and no individual held a vested right therein.

United States v. Jim, 409 U.S. 80, 82 (1972); *Sizemore v. Brady,* 235 U.S. 441, 446, 449 (1914).

Second, Appellee admits only a portion of the record when she asserts that Congress was "assured" that persons who subsequently became known as the litigation class, "Kansas Delawares," would not be excluded from the distribution. On the contrary, the tribal attorney for the Delaware Tribe represented:

> Mr. Chairman, *we* do not think there are any such [people who will be excluded]. *We know the Bureau maintains there are.* J.S. App. 67 (emphasis added).

In short, Congress knew the matter was disputable. The fact that no group that was subsequently identified as the so-called "Kansas Delawares" was mentioned sprang from the fact that *there was no such group,* in contradistinction to the Munsee groups. Appellee and her ancestors long before had vanished into the general citizenry and no longer were regarded as Indians, much less Delaware Indians. True, the Munsee groups, which had maintained tribal characteristics for more than a century and a half, although living in Wisconsin and Canada,[9] were mentioned because in substantial part they had caused the delay in distribution of the award for the old 1818 wrong. But to say that the Munsees were considered and excluded by Congress is not to say that the congressional experts in Indian Affairs who framed this legislation entertained the illusion that during the long span between 1854 and 1906 there had been no expatriation whatsoever from the Tribe. It would be imputing to Congressmen who daily deal with Indian Affairs a high

[9] C. WESLAGER, THE DELAWARE INDIANS 15-25 (Rutgers U. 1972).

degree of naivete to say they reasonably believed that no Indians abandoned their tribe during a 52-year period, especially when it includes the reign of the Indian removal and Oklahoma allotment policies where there were incentives—good or bad—to force Indian assimilation into the dominant society.[10] Given the vicissitudes of federal intercourse with Indians in general and the Delawares in particular, the patterns of repeated migration and all the possible permutations of the tribal relationship, it becomes incredible to presume that Congress thought that by adopting a 1906 Delaware roll as the basis of eligibility it was effecting a perfectly comprehensive distribution to all descendants of the 1854 Delaware Nation.

Those who have been designated "Kansas Delawares" in this litigation are descendants of individuals who took their share of tribal assets, who took land in severalty, who chose no longer to live as Indian or Delaware people, and thereafter disappeared into the dominant society as citizens and freeholders no longer

[10] The Indian long has been held to possess an inherent right to expatriate himself from his tribe on his own initiative. *United States ex rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14,891 (C.C. Neb. 1879). Moreover, numerous treaties and statutes were designed either expressly or impliedly to facilitate individual Indians' formal and informal dissolution of their tribal relations. *See e.g.*, Treaty of Feb. 27, 1867, 15 Stat. 531 (Potawatomi); Treaty of Feb. 23, 1867, 15 Stat. 513 (Ottawa, others); Treaty of June 28, 1862, 13 Stat. 623 (Kickapoo); Treaty of Nov. 15, 1861, 12 Stat. 1191 (Potawatomi); Treaty of June 19, 1858, 12 Stat. 1037 (Sioux); Treaty of Feb. 5, 1856, 11 Stat. 663 (Stockbridge and Munsee); Treaty of Dec. 29, 1835, 7 Stat. 478 (Cherokee); Treaty of Oct. 20, 1832, 7 Stat. 381 (Chickasaw); Treaty of Sep. 27, 1830, 7 Stat. 333 (Choctaw); Treaty of Sep. 5, 1820, 7 Stat. 210 (Choctaw); Treaty of Feb. 27, 1819, 7 Stat. 195 (Cherokee); Treaty of July 8, 1817, 7 Stat. 156 (Cherokee).

specially entrusted to or protected by the United States.[11] They became, and are, aliens to the Tribe.

Finally, we suggest that the bewildering array of contentions that Appellee advances as to the tribal existence of the Delawares emphasizes our position that the majority below intruded itself into a political and nonjusticiable matter. The existence or non-existence of tribes and their systems of tribal membership have always been recognized to be matters for determination by the political branches of the Government. "If by [the political branches] those Indians are recognized as a tribe, this Court must do the same." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865). Whether the Court determines that Appellee's contentions must fail on that ground, or as we contend, on the ground that the majority attempted to reform a treaty, the result is the same, the matter should be treated as nonjusticiable. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

[11] Although this Court is not the place to try detailed geneological facts, Appellee Weeks makes references to Joseph A. Bartles, who served as Chairman of the Delaware Tribal Business Committee from 1924-1951. He was the son of Nannie Bartles, one of the adult Kansas "Delawares" who remained in Kansas in 1867. But Nannie did not remain there for long. She soon rejoined the tribe, and her son was born in Indian Territory. Whatever the facts may be as to this, the District Court did not see fit to make any findings on the question. (Footnote 6 of the District Court's opinion indicates that perhaps the Court did not even admit evidence on this question. J.S. App. 5a-6a n. 6.) This matter illustrates the rationale for the courts' traditional reluctance to consider questions of this nature, and counsel's assertions present merely a diversionary tactic.

CONCLUSION

We respectfully pray that this Court reverse the judgment below and remand the case to the District Court with directions to dismiss the cases.

Respectfully submitted,

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APPENDIX

APPENDIX A

Statutes Recognizing the Existence of the Delaware Tribe Since 1867

1. Act of July 27, 1868, ch. 248, 15 Stat. 198, 207.
2. Act of April 10, 1869, ch. 16, 16 Stat. 13, 22.
3. Act of July 15, 1870, ch. 296, 16 Stat. 335, 342.
4. Act of March 3, 1871, ch. 120, 16 Stat. 544, 552.
5. Act of May 29, 1872, ch. 233, 17 Stat. 165, 172.
6. Act of February 14, 1873, ch. 138, 17 Stat. 437, 446.
7. Act of June 22, 1874, ch. 389, 18 Stat. 146, 155.
8. Act of March 3, 1875, ch. 132, 18 Stat. 420, 430.
9. Act of August 15, 1876, ch. 289, 19 Stat. 176, 199.
10. Act of March 3, 1877, ch. 101, 19 Stat. 271, 293.
11. Act of May 27, 1878, ch. 142, § 2, 20 Stat. 63, 86.
12. Act of February 17, 1879, ch. 87, § 2, 20 Stat. 295, 315.
13. Act of May 11, 1880, ch. 85, § 2, 21 Stat. 114, 132.
14. Act of March 3, 1881, ch. 137, § 2, 21 Stat. 485, 501.
15. Act of May 17, 1882, ch. 163, § 2, 22 Stat. 68, 87.
16. Act of March 1, 1883, ch. 61, § 2, 22 Stat. 433, 450.
17. Act of July 4, 1884, ch. 180, § 2, 23 Stat. 76, 96.
18. Act of March 3, 1885, ch. 341, § 2, 23 Stat. 362, 383.
19. Act of May 15, 1886, ch. 333, § 2, 24 Stat. 29, 46.
20. Act of March 2, 1887, ch. 320, § 2, 24 Stat. 449, 466.
21. Act of June 29, 1888, ch. 503, § 2, 25 Stat. 217, 237.
22. Act of October 19, 1888, ch. 1211, 25 Stat. 608, 609.
23. Act of August 19, 1890, ch. 807, § 2, 26 Stat. 336, 360.

24. Act of October 1, 1890, ch. 1249, 26 Stat. 636.

25. Act of March 3, 1891, ch. 543, 26 Stat. 989, 994.

26. Act of July 13, 1892, ch. 164, 27 Stat. 120, 125, 143 (§ 2).

27. Act of March 3, 1893, ch. 209, 27 Stat. 612, 617, 638 (§ 2), 641 (§ 10).

28. Act of August 15, 1894, ch. 290, 28 Stat. 286, 292.

29. Act of June 28, 1898, ch. 517, § 25, 30 Stat. 495, 504.

30. Act of March 1, 1901, ch. 675, § 14, 31 Stat. 848, 850.

31. Act of July 1, 1902, ch. 1375, § 23, 32 Stat. 716, 718.

32. Act of April 21, 1904, ch. 1402, 33 Stat. 189, 205, 222 (§ 21).

33. Act of February 7, 1925, ch. 148, 43 Stat. 812.

34. Act of March 3, 1927, ch. 314, 44 Stat. 1358.

35. Act of June 4, 1936, ch. 491, 49 Stat. 1459.

see

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